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Perspectives on Public Power

A review of the public power model, its history, and its potential in Montana

Legislative Services Division

A Report to the 61st Legislature of the
State of Montana by the
Energy and Telecommunications Interim Committee

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Energy and Telecommunications Interim Committee
2007-08 Interim

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This report is a summary of the work of the Energy and Telecommunications Interim Committee. The work is specific to the 2007-08 committee's study of public power. A complete collection of information, including written minutes and, in some cases, audio minutes, outlining the committee's efforts is available on the ETIC web site:
www.leg.mt.gov/etic

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Introduction

Public power, in a variety of forms, has a long history in Montana. In its simplest form, public power means that citizens own and operate their own public power utility. There are different forms of public power, depending on the governing body that owns and operates a public utility. In Montana there are electrical cooperatives and municipal power operations. Efforts to grant the state, or a board or authority attached to the state, the ability to own and operate utilities also have been pursued.

The 2007-08 Energy and Telecommunications Interim Committee (ETIC) dedicated 0.10 FTE to a study of public power, based on its Final Work Plan, adopted in October 2007. The study evaluated the public power model, its potential operation in Montana, and the role the state could and has played in a public power scenario.

In its simplest form, public power means that citizens own and operate their own public power utility.

At the close of the interim, the ETIC ultimately did not pursue public power legislation. However, the committee members felt it was appropriate to share the information they had gathered during the interim, as well as offer some general findings on the subject.

ETIC Study Tasks, Responses, and Findings

ETIC Response:

A staff report discussing actions of the 2007 Legislature, as well as a historical perspective on public power, was prepared for the ETIC in January 2008. The ETIC also hosted a public power panel discussion in January that included Ken Sugden, general manager, Flathead Electric Cooperative; Scott Sweeney, general manager, Fergus Electric Cooperative; Gary Wiens, assistant general manager, Montana Electric Cooperatives' Association; and Jim Morton, executive director, Human Resource Council. At the ETIC's May meeting, municipal power representatives, including Mike Kadas, Montana Public Power, Inc.; Alec Hansen, Montana League of Cities and Towns; and Clint Taylor, power manager for Troy Public Power, discussed the issue.

Study Task:

Review the regulatory framework in Montana in relation to the public power model.

ETIC Findings:

Finding: A variety of public power legislation, including voter-initiated activity, has been pursued in Montana during the past decade.

Finding: With the 2007 Montana Legislature's approval of House Bill No. 25, the Electric Utility Industry Generation Reintegration Act, Montana tailored customer choice options. Small customers who are presently receiving power from some utilities can no longer migrate, for example, to municipal utilities or buying cooperatives. Municipal utilities or public power utilities would not be able to provide electricity to those customers unless such a utility was to acquire the existing utility.

Study Task:

Review a summary of public power options utilized in the West.

ETIC Findings:

Finding: There are 26 cooperatives operating in Montana, and the City of Troy Municipal Electric Utility serves as Montana's only municipal electric utility. The City of Great Falls also is an active electricity supplier.

Finding: There are a variety of different public power models that operate in the West. Most are tailored to meet specific state needs.

Overview

This report provides general background information on public power frameworks that have been discussed and pursued in Montana. In accordance with the ETIC's work plan, this report also includes an overview of other public power models employed in the West and Midwest.

Before delving into a look at the history of public power in Montana, a brief discussion of legislation considered by the 2007 Legislature is appropriate. With the approval of House Bill No. 25 (HB 25), the Electric Utility Industry Generation Reintegration Act, in 2007, Montana tailored customer choice options in favor of a framework that establishes a stable customer base for certain utilities. Small customers, those with an average monthly demand of less than 5,000 kilowatts, who are presently receiving power from a utility, for example, NorthWestern Energy, can no longer migrate to municipal utilities or buying cooperatives. Municipal utilities or public power utilities then would not be able to provide electricity to those customers unless such a utility was to acquire the existing investor-owned utility.

With the approval of HB 25 in 2007, small customers who are presently receiving power from a utility can no longer migrate to municipal utilities or buying cooperatives.

A Look Back at Public Power

2007 Legislation

Legislators also were introduced to at least two versions of public power legislation in the 2007 session. Senate Bill No. 558 (SB 558), sponsored by Senator Greg Lind, would have established a five-member Montana Electric and Gas Authority, attached to the Department of Commerce. Acquisitions of a utility by the Authority would have required the approval of the Public Service Commission. Members of the Montana Electric and Gas Authority would have originally been appointed by the Governor. However, once the Authority acquired a utility, legislation would have been required outlining the election of the five members by the customers of the acquired utility. The Authority would have had broad authority to purchase or sell electrical capacity and energy from suppliers and enter into contracts. It also could acquire, construct, improve, rehabilitate, maintain, and operate electrical generation facilities, transmission and distribution facilities, and related facilities. Provisions also were included to ensure that revenue lost by any taxing unit was reimbursed. The bill failed on third reading on a 25-25 vote on the Senate floor.

House Bill No. 346 (HB 346), introduced by Representative Deb Kottel, would have allowed local governments with self-governing powers that owned or leased an electrical generation facility with a minimum of 50 megawatts of capacity to provide electricity services within its jurisdictional limits. Based on HB 346, a local government supply entity that adopted a plan to supply customers before July 1, 2011, also could have become a default supplier as long as specific conditions were met. The bill was tabled by the House Federal Relations, Energy and Telecommunications Committee.

A Retrospective

Both pieces of legislation discussed above were preceded by several similar bills that were aimed at establishing varying forms of public power. In 2005, House Bill No. 778, the Montana Hydroelectric Security Act, would have created a Montana Public Power Commission consisting of five elected members. The

Commission was to conduct an assessment of existing hydroelectric facilities and determine whether or not the state should acquire those dams. The Commission would have had the authority to sell electrical energy at a retail or wholesale level to Montana customers. The Commission would have had the authority to use proceeds from the issuance and sale of revenue bonds by the Board of Examiners to purchase hydroelectric facilities.

In 2005 and 2007, several pieces of legislation were introduced aimed at establishing varying forms of public power.

The legislation, however, raised several constitutional questions, as did an initiative with essentially the same language that was proposed in 2001. The proposed legislation, applying only to hydroelectric facilities, raised concerns about special legislation, delegation of authority, impairment of contracts, and statutory conflicts.

The 2005 Montana Hydroelectric Security Act was modeled largely after language proposed in an initiative that was on the November 2002 ballot. Initiative 145 (I-145) was known as the "Buy Back the Dams" initiative. Under the proposal, a public power commission would have first reviewed existing dams to determine if it was in the state's interest to purchase them. The commission then could have negotiated to purchase them, issuing up to $500 million in revenue bonds to finance a purchase. The bonds would have been repaid with revenue from power sales. If utilities refused to sell, the state would have been granted the power of eminent domain to condemn the dams and pay fair market value. Preference for the power would have gone to customers in the former Montana Power Co. electric territory prior to January 1, 1997, and customers with an average metered demand of less than 1 megawatt. Language in the initiative required that lost tax revenue be reimbursed, but I-145 opponents raised concerns about the amount of lost tax revenue. Attached in **Appendix A** is a report by Legislative Services Division Research Analyst Jeff Martin outlining property tax and revenue implications. A legal opinion issued by the Legislative Services Division's Director of Legal Services Greg Petesch

discussing language proposed for I-145 is attached in **Appendix B.** It outlines legal concerns surrounding the initiative language.

Also on the ballot in November 2002 was Initiative Referendum 117 (IR-117). Both IR-117 and I-145 were on the ballot in response to a Montana electric utility deregulation law passed by the Montana Legislature in 2001. IR-117 was a referendum to repeal House Bill No. 474 (HB 474), which allowed the state to create up to 450 megawatts of electrical energy generation from new sources and purchase up to 120 megawatts of electrical energy from existing facilities. Based on HB 474, the Board of Investments was to review applications from new and existing generators for in-state investments. The bill established a consumer electricity support program with up to $100 million a year from the revenue derived from an electrical energy excess revenue tax. A Montana Power Authority with seven members appointed by the Governor would have overseen the planning and purchasing of electrical energy.

Montanans defeated I-145 and, through IR-117, repealed the energy law, HB 474, passed by the 2001 Legislature. By rejecting HB 474 the voters eliminated the act and voided the action of the 2001 Legislature. The ballot language of both I-145 and IR-117, as well as statements from proponents and opponents, is included in **Appendix C.** Additional efforts to create a Montana Public Power Board through an initiative process have been pursued in the state in the last 3 years; however, an insufficient number of signatures was filed to place the measure on the ballot.

Public Power Options

Cooperative Utilities

In Montana there are 26 nonprofit electric cooperatives that serve more than 150,000 customers. Cooperatives are locally owned and operated by cooperative members. Each cooperative's elected board makes pricing and policy decisions for the consumer's electricity. Three of the nonprofit electric cooperatives in Montana generate electricity for customers. Customers of electric cooperatives are considered part owners of a cooperative. Electric cooperatives elect a board of directors to set customer protection policies and establish rates for electricity distribution and supply. Cooperatives are not regulated by the Montana Public Service Commission. The laws governing cooperatives in Montana are outlined in Title 35, chapter 18, the Rural Electric and Telephone Cooperative Act. The powers that a cooperative may exercise are explicitly stated as are the laws guiding incorporation. Additional exemptions and requirements are contained in Title 69, chapters 3 and 8, MCA. A list of cooperatives in Montana is included in **Appendix D**.

In Montana there are 26 nonprofit electric cooperatives that serve more than 150,000 customers.

Municipal Utilities

Based on Montana law, a local government with self-governing powers has the authority to own and operate an electric and natural gas utility. A municipal electric utility regulates, establishes, and charges rates and classifications imposed on citizens. The City of Troy is a municipal utility in Montana, with the city's governing body making rate and policy decisions. In 2005, the City of Great Falls also established itself as a municipal utility, Electric City Power. The City is an electricity supplier but does not own distribution facilities. The Montana Public Service Commission licensed the City as an "electricity supplier"

in accordance with the Electric Utility Industry Restructuring and Customer Choice Act (now the Electric Utility Industry Generation Reintegration Act), Title 69, chapter 8, MCA. As of October 1, 2007, however, that approval will no longer be needed due to the enactment of HB 25, which was discussed previously in this report and tailored customer choice.

In 2004, the cities of Bozeman, Great Falls, Helena, and Missoula and the consolidated city-county government of Butte-Silver Bow entered into an interlocal agreement creating the Montana Public Power Authority (MPPA) for the purpose of acquiring and operating certain electric and natural gas systems. The interlocal agreement for the creation of MPPA is attached in **Appendix E.** The MPPA incorporated Montana Public Power, Inc. (MPPI) to serve as the legal entity that would operate the electrical and natural gas transmission and distribution assets.

In July 2006, NorthWestern Energy's board of directors rejected MPPA's bid of $2 billion, noting that it believed the offer was not in the best interests of NorthWestern's shareholders or customers. NorthWestern later accepted an offer of $2.97 billion from Babcock & Brown of Australia. That offer, however was blocked by the Montana Public Service Commission in the summer of 2007.

In 2000, former Attorney General Joe Mazurek issued an opinion (48 A.G. Op. 14) holding that a local government with self-governing powers has the authority to own and operate an electric and natural gas utility. The opinion holds that operation of a utility is a public purpose and that municipal operation of a utility is not prohibited by Montana law. The Montana Nonprofit Corporation Act, Title 35, chapter 2, MCA, also allows an authority, such as MPPA, to incorporate a public benefit nonprofit corporation to operate an electric and natural gas utility, according to an additional Attorney General's opinion. In July 2005, Attorney General Mike McGrath issued an opinion (51 A.G. Op. 5) finding that:

1. Under the Montana Nonprofit Corporation Act, an authority created pursuant to an interlocal agreement among self-governing municipalities may

incorporate a public benefit nonprofit corporation to operate an electric and natural gas utility.

2. An authority created by interlocal agreement between self-governing municipalities may exercise only those powers that any of the municipalities might exercise.

3. Operation of an electric and natural gas utility is a public purpose for which a self-governing municipality may grant funds.

4. Debt incurred through corporate bonds issued by a public benefit nonprofit corporation incorporated by an authority created by interlocal agreement between self-governing municipalities is not subject to laws regulating municipal debts or obligations if the municipalities are not legally obligated to appropriate money to pay the debt, and the debt is without recourse to the spending powers of the municipalities.

In 2004, the cities of Bozeman, Great Falls, Helena, and Missoula and the consolidated city-county government of Butte-Silver Bow entered into an interlocal agreement creating the Montana Public Power Authority.

The opinion states that a self-governing municipality is not limited to providing electric and natural gas utility services through transmission and distribution assets owned and operated directly by the municipality. The opinion did not address whether the financing arrangements that MPPI planned to use in acquiring a utility complied with the requirements of Title 69, chapter 3, part 5, MCA, which deals with investment and financing of public utility assets.

Public Power Examples — Outside Montana

A total of 46 public power utilities have formed over the last 2 years, according to statistics compiled by the American Public Power Association. Many of these are focused on municipalities taking action. The 10 largest U.S. publicly owned generator electric utilities are included in a Department of Energy Report from 2000, which is contained in **Appendix F**. A couple of the most recently formed municipal public power organizations are in Oregon. The Hermiston, Oregon, Energy Services was formed in 2001, following a 4-year negotiation with the

investor-owned utility (IOU) operating in the area. The effort started after the IOU closed its customer service office and citizens raised concerns about declining services. The utility fought the City of Hermiston's condemnation proceeding in court, but the court ruled in favor of the City. The utility later agreed to sell the system to the City. The Emerald People's Utility District was formed in 1983 in Eugene, Oregon. Citizens there approved a $72 million bond issue to purchase a utility. The community bought the distribution system and all customer accounts. Formation of the district took 13 years and included 14 legal actions.[1]

Washington

Washington public power laws provide for the establishment of municipal corporations that encompass elements of private corporations, rural electric cooperatives, and municipal utility systems. Public Utility Districts (PUDs) have a board of commissioners. There are now 28 PUDs providing electric, water, and/or sewer service. Each PUD is operated by an elected commission. The PUD law is outlined in Revised Codes of Washington, Title 54.[2]

Wyoming

A Wyoming Municipal Power Agency (WMPA) serves as the wholesale electricity provider for eight public power communities in Wyoming. Four additional communities are associate member that do not receive power from WMPA but are represented by the Agency. The Agency's generation capacity comes from its ownership of the Missouri Basin Power Project, including the Laramie River Station. The WMPA also has agreements in place to purchase federal hydropower. WMPA serves about 15,189 meters, including commercial and residential meters. The laws pertinent to Wyoming are included in Title 37 of the Wyoming Statutes.[3]

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[1] http://www.epud.org/hist.aspx

[2] http://apps.leg.wa.gov/rcw/default.aspx?Cite=54

[3] http://legisweb.state.wy.us/statutes/statutes.aspx?file=titles/Title37/Title37.htm

Colorado

In Colorado, the Platte River Power Authority generates and delivers electricity to its owner communities of Estes Park, Fort Collins, Longmont, and Loveland, Colorado, where it is distributed by each municipal utility to residents and businesses. The Authority serves about 142,095 customers. To meet its obligations, the Authority uses federal hydropower purchased from the Western Area Power Administration (WAPA), coal-fired power, four natural gas-fired combustion turbines, 10 wind turbines, and purchases from the wholesale electricity market in the region. Platte River also jointly or wholly owns 700 miles of transmission line.

The Authority operates under a contract with the municipalities, acting as a wholesale electric utility that acquires, constructs, and operates generation and supplies electricity on a requirements basis. Platte River is a political subdivision and public corporation of the State of Colorado, established by the Colorado Legislature in 1973.[4]

Arizona

The Arizona Power Authority was created as a result of federal legislation allocating a portion of power produced from Hoover Dam. In 1944, the Arizona Legislature created the Authority outlined in Title 30, Arizona Revised Statutes. The Authority markets and schedules its share of the Hoover Dam power to 39 customers in Arizona, including cities and towns, irrigation and electrical districts, and the Central Arizona Water Conservation District. The law charges the Authority with the responsibility of acquiring and marketing Arizona's share of power from Hoover Dam.[5]

Nebraska

The Nebraska Public Power District (NPPD) is Nebraska's largest electric utility. It was formed in 1970 when several power districts merged. The NPPD is a public corporation and a subdivision of the State of Nebraska. It is governed by

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[4] Colorado Revised Statutes, 29-1-204.

[5] http://www.powerauthority.org/

an 11-member elected board of directors. An annual budget is submitted to the Nebraska Power Review Board for review. Because the district serves both as a retail and wholesale provider, the district provides electricity to an estimated 1 million people in Nebraska. A mix of generation sources, including nuclear power, steam plants, a combined-cycle facility, wind generation facilities, nine hydroelectric facilities, nine diesel plants, and three peaking units, provide electricity. The district also purchases electricity from WAPA.

"Any public power district or public power and irrigation district may sell to any public power district, public power and irrigation district, irrigation district, city or village, any power plant, electric generating plant, electric distribution system, or any parts thereof, for such sums and upon such terms as the board of directors of such public power district or public power and irrigation district may deem fair and reasonable."[6]

In October 2007, the American Public Power Association compiled general information for the ETIC about public power authorities and state power authorities. That report is included in **Appendix G**. It offers a much more in-depth look than the brief synopsis listed above.

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[6] Nebraska Revised Statutes, 70-649.

Conclusions

In the last 10 years, a variety of public power models have been pursued in Montana. This report offers only a snapshot and limited details on the public power model, as well as those models used in other states. In the years to come, public power will likely remain a topic brought before and contemplated by the Montana Legislature. The ETIC offers this report as a tool to assist lawmakers and the public in those continuing conversations.

Appendix A

PROPERTY TAX AND REVENUE IMPLICATIONS OF INITIATIVE 145 TO BUY THE DAMS[7]

Prepared by Jeff Martin, Research Analyst
Legislative Services Division

July 2002

INTRODUCTION

If Initiative Measure 145 (I-145) to buy the dams in Montana is submitted to and approved by the voters in November 2002 and the state purchases any of the dams, the Montana Power Commission would be required, as provided in the initiative, to:

> *reimburse any loss of revenue to any taxing unit, as defined in 15-1-101, associated with the acquisition of any hydroelectric facility. Reimbursement of local governments must be implemented as provided by law.*

The Legislature would have to devise a reimbursement scheme to replace the property tax revenue imposed on the owners of the dams.

The purpose of this report is to assess the property tax and revenue implications on local governments and the state if I-145 becomes law. The report presents data on the market value and taxable value of the dams in each county, shows the relative importance of the dams to the property tax base of taxing jurisdictions within the county, and provides the amount of property taxes due on the dams. The property taxes from the dams shown in the report are not the amounts that would have to be replaced, but are indicative of the reimbursement should the state acquire the dams.

Data has been compiled for tax year 2001 and fiscal year 2002, which ended June 30, 2002. The total property taxes paid for the dams shown in this report may understate by a small amount the potential fiscal impact of the dams going public because the amounts shown do not include nonoperating property associated with the dams or assessments made against property on some basis other than mill levies.

I-145 would allow the state of Montana to acquire hydroelectric facilities in the state with an installed electrical generation capacity of greater that 5 megawatts. There are 12 privately owned hydroelectric facilities in Montana that would qualify for purchase if the initiative were approved by the voters. Those facilities are listed in Table I.

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[7] A version of this report was presented to the Energy Policy Subcommittee of the Environmental Quality Council. This report contains some minor revisions in the introduction and a brief discussion of tax incidence and corrects a few mill levy totals and the misidentification of an affected school district in Lewis and Clark County. These corrections do not affect the total amount of taxes paid on the dams in fiscal year 2002.

Table 1: Electric Power Generating Capacity of Selected Montana Dams, November 2001

Dam	County	Nameplate Capacity in Megawatts
Black Eagle	Cascade	21.3
Cochrane	Cascade	48.0
Morony	Cascade	45.0
Rainbow	Cascade	35.6
Ryan	Cascade	48.0
Kerr	Lake	211.7
Hauser	Lewis and Clark	17.0
Holter	Lewis and Clark	38.4
Madison	Madison	9.0
Thompson Falls	Sanders	91.0
Noxon Rapids	Sanders	466.2
Mystic Lake	Stillwater	10.0
Total Nameplate Capacity		1,041.2

Source: *Understanding Electricity in Montana,* Draft, Department of Environmental Quality, Table E1, May 8, 2002

Pennsylvania Power and Light (PPL Montana) acquired most of the Montana Power Company's generation assets in late 1999 for $757 million, or approximately $157 million above the estimated book value of the assets. As a result, the market value for property tax purposes of most of the assets, but not all, increased in the taxing jurisdictions in which the property is located (see below for a brief discussion of the allocation of market value of the dams purchased by PPL Montana). Property taxes were first assessed to PPL Montana in tax year 2000. Avista Corp. owns the Noxon Rapids dam in Sanders County. Although Avista Corp. has a few residential and commercial customers in the state, nearly all the electrical generation from the Noxon Rapids dam is sold out of state.

In the original restructuring legislation (SB 390, Ch. 505, L. 1997), the then-Revenue Oversight Committee was directed to "analyze the amount of state and local tax revenue derived from previously regulated electricity suppliers that will enter the competitive market . . .". As part of that analysis, the Committee recommended that centrally assessed electrical generation property be reclassified and that the property tax rate (the rate applied to market value to determine taxable value) on generation property be reduced from 12% to 6%. Based on the assumption that the purchase price would be close to book value, the Committee also recommended that a kilowatt hour tax be imposed on electric utility customers to offset the anticipated loss in property tax revenue. The recommendations were presented in House Bill No. 174 (Ch. 556, L. 1999). The 1999 Legislature adopted the first recommendation, but rejected the second. Instead, the Legislature imposed a wholesale energy transaction tax. The tax is imposed at a rate of 0.015 cent for each kilowatt hour of electricity transmitted by a transmission services provider in the state (see Title 15, chapter 72, MCA).

PROPERTY TAX BASE AND PROPERTY TAXES RELATED TO THE DAMS

This section of the report presents detailed information on the market and taxable value of each dam listed in Table 1 and property taxes due. The property taxes due on the dams in Cascade County and the Noxon Rapids dam in Sanders County were calculated by multiplying the taxable value of the dams by the relevant mill levy for each taxing jurisdiction. The property taxes due for all other dams were extracted from property tax notices.

Cascade County

There are five dams in Cascade County that are owned by PPL Montana. Although the dams are all located within the Great Falls high school district, portions of Cochrane, Morony, and Ryan dams have situs in both the Great Falls elementary school district and the Belt elementary school district. Table 2 shows the market value and taxable value for each district in tax year 2001 (fiscal year 2002).

TABLE 2: Market Value and Taxable Value of Dams in Cascade County--Tax Year 2001

Hydroelectric Facility	Market Value GF Elem.	Market Value Belt Elem.	Total MV Cascade Cnty.	Taxable Value GF Elem.	Taxable Value Belt Elem.	Total TV Cascade Cnty.
Black Eagle	$12,582,163	0	$12,582,163	$754,930	0	$754,930
Cochrane	33,399,508	$11,454,341	44,853,849	2,003,971	$687,260	2,691,231
Morony	29,848,202	10,671,080	40,519,282	1,790,892	640,265	2,431,157
Rainbow	18,875,292	0	18,875,292	1,132,518	0	1,132,518
Ryan	44,011,828	16,716,140	60,727,968	2,640,710	1,002,968	3,643,678
Total	$138,716,993	$38,841,561	$177,558,554	$8,323,021	$2,330,493	$10,653,514

Source: Montana Department of Revenue spreadsheets

Table 3 shows the relative importance of the dams to the tax base for each taxing jurisdiction. The dams are relatively more important in the Great Falls high school district than in the county as a whole because the overall tax base of the high school district is smaller than the county as a whole.

TABLE 3: Relative Importance of Electrical Generation Property to Property Tax Base by Taxing Jurisdiction in Cascade County--Tax Year 2001 (FY 2002)

Taxing Jurisdiction	Total Market Value in Taxing Jurisdiction	Electrical Generation as % of Total MV	Total Taxable Value in Taxing Jurisdiction	Electrical Generation as % of Total TV
Cascade County	$2,821,973,629	6.3%	$109,391,092	9.7%
Great Falls High	2,388,909,336	7.4%	92,807,435	11.5%
Great Falls Elem.	2,330,651,947	5.9%	89,532,076	9.2%
Belt Elementary	177,589,699	21.9%	8,085,867	28.8%

Source: Montana Department of Revenue

The taxable value of the dams is relatively more important than market value in each taxing jurisdiction because generation property is subject to a higher tax rate than most other property. For example, the dams account for about 22% of the total market value in the Belt elementary school district but account for about 29% of the district's taxable value. Note that the total market value in the Belt school district is about the same as the total market value of the dams. Table 4 shows the estimated tax payments by school district, the county, and the state.

TABLE 4: Estimated Taxes From Dams by Taxing Jurisdiction in Cascade County--Tax Year 2001 (FY 2002)

Taxing Jurisdiction	Mills GF Elem.	Estimated Taxes GF Elem.	Mills Belt Elem.	Estimated Taxes Belt Elem.	Total Estimated Taxes
County					
County Funds	98.55	$820,234	98.55	$ 229,670	$1,049,904
Road	18.37	152,894	18.37	42,811	195,705
Library	5.42	45,111	5.42	12,631	57,742
Health	4.89	40,700	4.89	11,396	52,096
Planning	1.63	13,567	1.63	3,799	17,365
Total County	128.86	$1,072,504	128.86	$ 300,307	$1,372,812
State					
University	6.00	$49,938	6.00	$13,983	$63,921
Vo-Tech	1.50	12,485	1.50	3,496	15,980
State Equalization	40.00	332,921	40.00	93,220	426,141
County Equalization	55.00	457,766	55.00	128,177	585,943
School Retirement	37.09	308,701	37.09	86,438	395,139
School Transportation	4.23	35,206	4.23	9,858	45,064
Total State	143.82	$1,197,017	143.82	$ 335,172	$1,532,188
School District					
Elementary	123.45	$1,027,477	92.84	$ 216,363	$1,243,840
High School--GF	60.09	500,130	60.09	140,039	640,170
Total School District	183.54	$1,527,607	152.93	$ 356,402	$1,884,010
Total	456.22	$3,797,129	425.61	$ 991,881	$4,789,010

Note: The estimated taxes do not include nonoperating property.
Source: Montana Department of Revenue (Taxable Value, see Table 1) and Cascade County (Mill Levies)

The estimates are derived by multiplying taxable value figures by the appropriate mill levy. The estimates correspond to the property tax bills received by PPL Montana. Road levies are not assessed against property located within cities and towns; library, health, and planning levies are not assessed against property in Great Falls.

Total property taxes due on the dams in Cascade County are $4.79 million in the current fiscal year. Total county government property taxes from the dams amount to $1.37 million, and state taxes amount to $1.53 million. School district property taxes from the dams are: $1.03 million for the Great Falls elementary school district, $216,363 for the Belt elementary school district, and $640,170 for the Great Falls high school district.

Lake County

PPL Montana owns the Kerr dam in Lake County. There is also property associated with the dam in Flathead County, but is not included in this analysis.[8] Table 5 shows the relative importance of the Kerr dam to the tax base in Lake County and the Polson elementary and high school districts.

[8]The property tax assessment on property located in Flathead County is $59,802.

TABLE 5: Relative Importance of Kerr Dam to Property Tax Base by Taxing Jurisdiction in Lake County--Tax Year 2001 (FY 2002)

Taxing Jurisdiction	Total Market Value in Taxing Jurisdiction	Dams as Percentage of Total MV	Total Taxable Value in Taxing Jurisdiction	Dams as Percentage of Total TV
Lake County	$1,307,477,564	3.7%	$44,981,828	6.4 %
Kerr Dam	47,914,966		2,874,898	
Polson High School	$667,447,302	7.2%	$24,094,859	11.9%
Kerr Dam	47,914,966		2,874,898	
Polson Elementary	$540,653,803	8.9%	$20,309,990	14.2%
Kerr Dam	47,914,966		2,874,898	

Source: Montana Department of Revenue

The taxable value of the Kerr dam is relatively more important in the Polson elementary and high school districts than to Lake County as a whole because the overall tax bases of the school districts are much smaller than the county's.

Table 6 shows property taxes due by school districts, the county, and the state. The amounts are derived from property tax bills submitted to PPL Montana. Total property taxes due from the Kerr dam amount to $1.2 million in the current fiscal year. Total county government taxes are $301,166, and special district taxes are $16,674. State taxes, including the university levy and county school equalization levies and school retirement and transportation levies, amount to $418,657. School district property taxes from the dam are: $323,914 for the Polson elementary district and $145,297 for the Polson high school district.

TABLE 6: Taxes From Kerr Dam by Taxing Jurisdiction in Lake County--Tax Year 2001 (FY 2002)

Taxing Jurisdiction	Mills Polson Elementary	Total Estimated Taxes
County		
County Funds	104.76	$301,166
Other	5.80	16,674
State		
University	6.00	$17,249
School Levies	139.62	401,408
Total State	145.62	$418,657
School Districts		
Elementary	112.67	$323,914
High School	50.54	145,297
Total	419.39	$1,205,708

Source: PPL Montana Property Tax Statements and Montana Tax Foundation

Lewis and Clark County

PPL Montana owns two dams in Lewis and Clark County. Although the dams are located within the Helena high school district, Hauser dam is located in the Helena elementary school district and Holter dam has situs in both the Wolf Creek elementary school district and the Craig elementary school district. Table 7 shows the relative importance of the dams to the property tax base in each taxing jurisdiction.

TABLE 7: Relative Importance of Hauser and Holter Dams to Property Tax Base by Taxing Jurisdiction in Lewis and Clark County--Tax Year 2001 (FY 2002)

Taxing Jurisdiction	Total Market Value in Taxing Jurisdiction	Dams as Percentage of Total MV	Total Taxable Value in Taxing Jurisdiction	Dams as Percentage of Total TV
Lewis & Clark County	$2,186,144,761	1.9%	$83,468,754	2.9%
Hauser Dam	5,374,144	0.3%	$322,449	0.4%
Holter Dam	35,270,706	1.6%	2,116,242	2.5%
Helena High School	$2,043,293,793	2.0%	$78,589,178	3.1%
Hauser Dam	5,374,144	0.3%	322,449	0.4%
Holter Dam	35,270,706	1.7%	2,116,242	2.7%
Helena Elem.	$1,617,147,528	0.3%	$61,939,070	0.5%
Hauser Dam	5,374,144		322,449	
Wolf Creek Elem.	$68,952,406	32.7%	$2,935,646	46.1%
Holter Dam	22,533,900		1,352,034	
Craig Elem.	$46,621,105	27.3%	$1,904,358	40.1%
Holter Dam	12,736,806		764,208	

Source: Montana Department of Revenue

The dams are relatively insignificant to the county and Helena high school and elementary districts but are significant to the tax bases of the Craig and Wolf Creek elementary school districts. The elementary school districts would lose a significant amount of bonding capacity if the dams went public (see below for a brief discussion regarding bonding capacity). In particular, the Wolf Creek elementary school district would lose 46.1% of its bonding capacity, while the Craig elementary school district would lose 40.1% of its bonding capacity.

Property tax collections by taxing jurisdiction are shown in Table 8.[9] Total taxes due amount to just over $1 million, with each level of government getting about one-third of the total.

[9]There is a small amount of property located in the East Helena elementary school district. The total tax due on this property is $3,991.

TABLE 8: Taxes From Dams by Taxing Jurisdiction in Lewis & Clark County--Tax Year 2001 (FY 2002)

Taxing Jurisdiction	Mills Helena (Hauser)	Taxes Helena Elementary	Mills Wolf Creek (Holter)	Taxes Wolf Creek Elementary	Mills Craig (Holter)	Taxes Craig Elementary	Total Taxes
County	152.27	$49,099	152.27	$205,874	152.27	$116,366	$371,339
State							
University	6.00	$1,935	6.00	$8,112	6.00	$4,585	$14,632
Vo-Tech	1.50	484	1.50	2,028	1.50	1,146	3,658
School Levies	141.61	45,662	141.61	191,461	141.61	108,219	345,342
Total State	149.11	$48,081	149.11	$201,601	149.11	$113,950	$363,632
School Districts							
Elementary	153.35	$49,448	13.45	18,185	14.45	$11,042	78,675
High School	92.90	29,955	92.90	125,604	92.90	70,995	226,554
Total	547.63	$176,583	407.73	$551,264	408.73	$312,353	$1,040,200

Source: PPL Montana Property Tax Statements and Montana Tax Foundation

Madison County

Tables 9 and 10 show the contribution of the Madison dam to the county tax base and the taxes due on the dam by taxing jurisdiction, respectively.

TABLE 9: Relative Importance of Madison Dam to Property Tax Base by Taxing Jurisdiction in Madison County--Tax Year 2001 (FY 2002)

Taxing Jurisdiction	Total Market Value in Taxing Jurisdiction	Dam as Percentage of Total MV	Total Taxable Value in Taxing Jurisdiction	Dam as Percentage of Total TV
Madison County	$672,846,257	0.9%	$26,750,880	1.4%
Madison Dam	6,176,779		370,779	
Ennis K-12	$428,320,241	1.4%	$16,910,567	2.2%
Madison Dam	6,176,779		370,779	

Source: Montana Department of Revenue

TABLE 10: Taxes (FY 2002) From Madison Dam by Taxing Jurisdiction in Madison County--Tax Year 2001

Taxing Jurisdiction	Mills Ennis K-12	Total Estimated Taxes
County		
County Funds	100.41	$37,213
Other	18.62	6,901
Total County	119.03	$44,114
State		
University	6.00	$2,223
School Levies	127.96	47,423
Total State	133.96	$49,646
School District		
K-12	89.43	$33,143
Total	342.42	$126,903

Source: PPL Montana Property Tax Statements and Montana Tax Foundation

The Madison dam is relatively insignificant to the county fisc.

Sanders County

There are two dams in Sanders County. The Thompson Falls dam is owned by PPL Montana, and the Noxon Rapids dam is owned by Avista Corp. Table 11 shows the relative importance of the dams in Sanders County and the elementary and high school districts in which the dams are located.

The dams make up a significant portion of the property tax base in Sanders County. The dams account for about 30% of the taxable value in the county and much higher percentages in the various school districts. Centrally assessed property, including the dams, transmission and distribution lines, and telecommunications and natural gas property, has always been a significant component of the county's tax base. In tax year 1999, before the property tax rate changes in House Bill No. 174 (1999 legislative session) became effective, centrally assessed property in Sanders County accounted for about 60% of the tax base, while in tax year 2000, with the rate changes, the same property accounted for 50% of the tax base.

TABLE 11: Relative Importance of Thompson Fall and Noxon Dams to Property Tax Base by Taxing Jurisdiction in Sanders County--Tax Year 2001 (FY 2002)

Taxing Jurisdiction	Total Market Value in Taxing Jurisdiction	Electrical Generation as % of Total MV	Total Taxable Value in Taxing Jurisdiction	Electrical Generation as % of Total TV
Sanders County	$743,823,152	18.1%	$26,920,887	29.8%
Thompson Falls dam	69,932,522	9.4%	4,195,950	15.6%
Noxon Rapids dam	64,682,793	8.7%	3,880,967	14.2%
T-Falls Elementary	$302,781,309	23.1%	$10,688,841	39.3%
Thompson Falls dam	69,932,522		4,195,950	
T-Falls High School	$307,012,516	22.8%	$10,821,497	38.8%
Thompson Falls dam	69,932,522		4,195,950	
Noxon Elementary	$117,532,972	34.3%	$5,172,999	46.8%
Noxon Rapids dam	40,351,424		2,421,085	
Trout Creek Elem.	$91,944,561	26.5%	$3,971,441	36.8%
Noxon Rapids dam	24,331,369		1,459,882	
Noxon High School	$205,246,326	31.5%	$9,011,784	43.1%
Noxon Rapids dam	64,682,793		3,880,967	

Source: Montana Department of Revenue

Table 12 shows the taxes paid on the Thompson Falls and Noxon Rapids dams. The Noxon Rapids dam is located in the Noxon high school district and the Noxon and Trout Creek elementary school districts.

TABLE 12: Taxes From Dams by Taxing Jurisdiction in Sanders County--Tax Year 2001 (FY 2002)

Taxing Jurisdiction	Mills Noxon Elementary	Taxes Noxon Elementary	Mills T-Falls Elementary	Taxes T-Falls Elementary	Mills Trout Creek Elementary	Taxes Trout Creek Elementary	Total Taxes
County	73.48	$177,904	73.48	$308,683	73.48	$107,272	$593,859
State							
University	6.00	$14,527	6.00	$25,205	6.00	$8,759	$48,491
School Levies	109.77	265,770	109.77	461,141	109.77	160,251	887,162
Total State	115.77	$280,297	115.77	$486,346	115.77	169,010	$935,653
School Districts							
Elementary	70.55	$170,808	76.92	$323,130	51.70	$75,476	$569,414
High School	46.62	112,870	56.34	236,677	46.62	68,060	417,607
Total	306.42	$741,879	322.51	$1,354,836	287.57	$419,818	$2,516,533

Source: Avista Corp. and PPL Montana Property Tax Statements, Montana Tax Foundation, and Montana Department of Revenue

Total property taxes assessed against the dams amounts to $2.5 million, with school levies, including state and school district levies, accounting for about 75% of the total collections. Avista Corp. was

assessed a little over $1.2 million in property taxes for the Noxon Rapids dam and about $300,000 for transmission lines (not included in the table).[10]

Stillwater County

Tables 13 and 14 show the contribution of the Mystic Lake dam to the tax bases in Stillwater County and the taxes due on the dam by taxing jurisdiction, respectively.

TABLE 13: Relative Importance of Mystic Lake Dam to Property Tax Base by Taxing Jurisdiction in Stillwater County--Tax Year 2001 (FY 2002)

Taxing Jurisdiction	Total Market Value in Taxing Jurisdiction	Dam as Percentage of Total Market Value	Total Taxable Value in Taxing Jurisdiction	Dam as Percentage of Total Taxable Value
Stillwater County	$826,635,350	0.4%	$31,675,450	0.6%
Mystic Dam	3,026,143		181,568	
Fishtail Elementary	$48,633,825	6.2%	$1,960,332	9.3%
Mystic Dam	3,026,143		181,568	
Absaroke High	$329,318,738	0.9%	$11,109,543	1.6%
Mystic Dam	3,026,143		181,568	

Source: Montana Department of Revenue

TABLE 14: Taxes From Dams by Taxing Jurisdiction in Stillwater County--Tax Year 2001 (FY 2002)

Taxing Jurisdiction	Mills	Total Taxes
County		
County Funds	90.95	$16,514
Other	0.73	133
Total County	91.68	16,647
State		
University	6.00	1,089
School Levies	121.17	22,001
Total State	127.17	23,090
Elementary School	24.78	4,499
High School	41.51	7,536
Total	285.14	$51,772

Source: PPL Montana Property Tax Statements and Montana Tax Foundation

Except for the Fishtail elementary school district, the Mystic Lake dam is an insignificant contributor to the financial resources of Stillwater County.

[10] Table 12 also does not include special nontax assessments of $62,967 due on the Thompson Falls dam.

PROPERTY TAX IMPLICATIONS RELATED TO THE DAMS GOING PUBLIC

Table 15 summarizes taxes paid on hydroelectric facilities for tax year 2001 (fiscal year 2002). Based on tax year 2001 taxable valuations and mill levies, the state would lose $3.3 million and local taxing jurisdictions would lose $6.4 million in local and school district property taxes if the state were to purchase the dams.

TABLE 15: Taxes Paid on Dams by County--Tax Year 2001 (FY 2002)

Taxing Jurisdiction	Cascade County	Lake County	Lewis and Clark County	Madison County	Sanders County	Stillwater County	Total
County	$1,372,812	$301,166	$371,339	$37,213	$593,859	$16,514	2,692,903
Special Districts		16,674		6,901		133	23,708
State							
University	$63,921	$17,249	$14,632	$2,223	$48,491	$1,089	$147,605
Vo-Tech	15,980		3,658				19,638
School Levies	1,452,287	401,408	345,342	47,423	887,162	22,001	3,155,623
Total State	$1,532,188	$418,657	$363,632	$49,646	$935,653	$23,090	$3,322,866
School Districts							
Elementary	$1,243,840	$323,914	$78,675	$33,143	$569,414	$4,499	$2,253,485
High School	640,170	145,297	226,554	(K-12)	417,607	7,536	1,437,164
Total	$4,789,010	$1,205,708	$1,040,200	$126,903	$2,516,533	$51,772	$9,730,126

However, section 15-10-420(1), MCA, allows governmental entities to impose mill levies "sufficient to generate the amount of property taxes actually assessed in the prior year . . .". Technically speaking, there may not be a loss of revenue because local taxing authorities would have the option of increasing mill levies to make up the difference.[11] If mill levies were increased, that increase would shift the tax burden from the dams to other classes of property. The proposed initiative to purchase the dams would require the reimbursement of lost property tax revenue associated with the acquisition of the dams, but leaves the implementation of the reimbursement scheme to the Legislature. Any reimbursement scheme may shift the incidence of the tax to other taxpayers. (See below for a brief discussion of tax shifting and tax incidence). A reimbursement to a local taxing jurisdiction would create an interesting anomaly. Section 15-10-420(7), MCA, allows taxing jurisdictions to increase mill levies to account for a decrease in reimbursements. However, the taxing jurisdiction is not required to adjust mill levies because of an increase in reimbursement.

Removing the dams from the tax base would reduce the bonding capacity (i.e., the ability to issue general obligation bonds) of local taxing jurisdictions. During the 2001 legislative session, the Legislature revised the way in which bonding capacity is determined, except for schools. Previously, bonding capacity was determined as a statutory percentage of taxable value, depending on the type of taxing jurisdiction, plus "add-backs" to bonding capacity related to a variety of tax rate reductions (going back

[11] The Department of Revenue is authorized to calculate the number of mills associated with county and state school equalization levies, the university levy, and the vocational-technical levies to raise the same amount of revenue as the previous year. However, those levies may not exceed the limits established for those levies.

many legislative sessions) associated with business equipment and related to changes in the taxation of other types of property (e.g., oil and gas production). House Bill No. 23 (Ch. 29, L. 2001) revised local government debt limits and certain bonding provisions. Bonding capacity is now determined simply as a percentage of market value (exclusive of exempt class four land and improvements). Under the market value method, Cascade County, for example, would lose 6.3% of its bonding capacity in tax year 2001 and Sanders County would lose 18.1% of its bonding capacity (see Table 2 and Table 11, respectively). All taxing jurisdictions in Sanders County would lose a substantial portion of their bonding capacity.

House Bill No. 24 (Ch. 10, L. 2001) made some minor revisions in the determination of school bonding capacity by removing the add-backs referred to above. Bonding capacity for a school is still 45% of the taxable value within the district. In tax year 2001, the loss in bonding capacity for the Great Falls high school district, the Great Falls elementary school district, and the Belt elementary school district would be 11.5%, 9.2%, and 28.8% respectively (see Table 3), while the school districts in Sanders County would lose between 36.8% and 46.8% of their bonding capacity.

Typically, governmental units do not approach their maximum debt limits, so the loss in bonding capacity may not adversely affect a governmental unit's ability to incur debt. However, absent some reimbursement scheme, other local property taxpayers would be subject to higher property taxes to pay off existing general obligation debt.

CHANGES IN THE PROPERTY TAX BASE SINCE 1999

Table 16 compares the current valuation of the PPL Montana dams, by county, with the valuation of the dams in tax year 1999 (fiscal year 2000), the last year in which the Montana Power Company owned the dams. The particular value for each dam in tax year 2001 is related to the valuation allocated to each dam following the sale to PPL Montana. The Noxon Rapids dam is shown separately.

Table 16: Change in Market Value and Taxable Value of Hydroelectric Facilities--Tax Years 1999 and 2001

Hydroelectric Facility	1999 Market Value	1999 Taxable Value	2001 Market Value	2001 Taxable Value	% Change MV	% Change TV
Cascade Co.	$52,155,415	$6,258,649	$177,558,554	$10,653,511	240.4%	70.2%
Kerr	17,474,975	2,096,996	50,400,602	3,024,035	188.4%	44.2%
Hauser	7,200,642	864,077	5,503,611	330,217	-23.6%	-61.8%
Holter	8,657,897	1,038,948	35,270,706	2,116,242	307.4%	103.7%
Madison	12,829,369	1,539,524	6,234,685	374,080	-51.4%	-75.7%
Thompson Falls	45,812,799	5,497,536	69,932,522	4,195,950	52.6%	-23.7%
Mystic Lake	10,315,994	1,237,919	3,026,143	181,568	-70.7%	-85.3%
Total	$154,447,091	$18,533,649	$347,926,823	$20,875,603	125.3%	12.6%
Noxon Rapids	$ 81,999,897	$ 9,839,988	$64,682,793	$3,880,967	-21.1%	-60.6%

Source: Montana Department of Revenue

All of the dams in Cascade County increased in value, as did Kerr dam, Holter dam, and the Thompson Falls dam. Hauser, Madison, and Mystic Lake dams all decreased in value. Based on the method of allocating value, the overall market value of the dams in the state increased by 125.3%, but because the tax rate on generation property was reduced from 12% to 6%, the taxable value attributable to the dams statewide increased by only 12.6%. In Cascade County, the market value of the dams increased by 240%

between tax years 1999 and 2001. In tax year 2001, relatively more of the market value of the dams was allocated to the Belt elementary school district so that market value in that district increased by slightly more than 377%. The overall taxable value increase attributable to the dams in the county was 70%, while the taxable value of the dams in the Belt elementary school district increased by about 139%.

TAX IMPACT, SHIFTING, AND INCIDENCE

"Tax impact" refers to the individual or business that has the legal liability to pay a tax regardless of whether the taxpayer bears the burden of the tax. "Tax shifting" is the process by which a tax is passed from its initial point of legal impact to its final economic resting place. "Tax incidence" refers to the actual economic impact of a tax on those who ultimately bear its burden.

Under the traditional ratemaking procedures for vertically integrated electrical utilities, the cost of service approach has been used to establish electric utility rates. This approach allows utilities the opportunity to recover their prudently incurred costs and earn a reasonable return on investment. Taxes are one of the components of the cost of service calculation and can be passed on to the customers of the regulated utility.

In a market structure that is different than the natural monopoly of the regulated utility, it is less clear who bears the tax incidence. Property taxes imposed on an electrical generator, depending on the market structure, may be shifted forward to consumers or backward to labor or owners of the property; the taxes may be exported or remain within the state. Although well beyond the scope of this report, an evaluation of the tax incidence of the property taxes paid on the state's dams may be desirable in developing the reimbursement scheme to offset lost property taxes associated with the sale of the dams.

CONCLUDING OBSERVATIONS

The analysis contained in this report is valid only for the current fiscal year--it is already stale. The data shows what the fiscal impact would be to taxing jurisdictions had the state acquired dams before the first day of tax year 2002. Centrally assessed property, which includes most electrical generation property, is valued annually for property tax purposes, and new values for the dams are now being developed. However, the analysis does provide an idea of the amount of property tax revenue that may need to be replaced if the state buys the dams.

I-145, if approved, directs the Montana Public Power Commission to reimburse local taxing units for any loss of revenue "associated with the acquisition of any hydroelectric facility". The Montana Legislature would have to create the reimbursement mechanism. The initiative measure is silent regarding the replacement of state property tax revenue. Table 15 shows that the state would lose $3.3 million for the university system (including vo-tech revenue), school equalization, and county retirement and transportation. If that revenue is not replaced, then the continuation of funding levels for the statewide levies would be at the expense of other programs.

The total amount of property tax revenue that would need to be replaced would depend on:

- which dams are acquired by the state;
- the assessed market value of the dams at the time of acquisition;
- the tax rate applied to the dams; and
- the mill levies in effect.

If the dams are acquired by the state, the total amount of property tax revenue to be replaced may be significantly different from the amount indicated in this report.

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Appendix B

December 3, 2001

Ken Toole
P.O. Box 1462
Helena, Montana 59624

Dear Mr. Toole:

On November 20, 2001, the Legislative Services Division received the text of your proposed initiative petition to create a Montana Public Power Commission and directing the Commission to conduct a due diligence analysis and acquire hydroelectric generation facilities in Montana by purchase or condemnation. The text of your initiative was reviewed pursuant to section 13-27-202, MCA, for clarity, consistency, and other factors normally considered when drafting proposed legislation. This letter constitutes the Legislative Services Division staff's recommendations concerning your proposal.

Only the text of the initiative is reviewed by this office. The title of the measure and the statements of implications ("FOR" and "AGAINST" language) are written by the Attorney General pursuant to section 13-27-312, MCA. The form of the petition is approved by the Secretary of State and the Attorney General pursuant to section 13-27-202(3), MCA.

STYLE ISSUES

Section 13-27-201(2), MCA, requires that the text of an initiative measure must be in the bill form provided in the most recent issue of the Bill Drafting Manual furnished by the Legislative Services Division. I note that very little effort has been made to conform the text to the style provisions contained in the 2000 Bill Drafting Manual. There is no specific statement in the 2000 Bill Drafting Manual requiring the text of legislation to be written in complete sentences. I apologize for that oversight and will remedy the omission in future editions of the Bill Drafting Manual. Because the "minor" style suggestions are so numerous, I will not enumerate each specific suggestion, but will merely incorporate the minor suggestions in the attached revised version of your proposal. In addition to the numerous "minor" style suggestions, I have additional suggestions and comments concerning style.

I note that the property to be acquired by the Montana Public Power Commission and financed through revenue bonds is referenced differently throughout the proposed measure. For example, equipment, contract rights, distribution and transmission facilities, and dams are included in some lists but not in others. I also note that references to property are treated differently. Unless the disparate treatment is intentional, I would suggest that all enumerations be consistent. An easy way to achieve consistency would be to include a definition of the term "hydroelectric generation facility" and then to use the defined term consistently throughout the measure.

I also note that the use of the proceeds of the revenue bonds by the Montana Public Power Commission is different than the purpose for which the Board of Examiners is authorized to issue the bonds. It appears essential that the purposes for which the bonds may be issued are

made consistent with the purposes for which the proceeds may be used. The inclusion of alternative renewable energy sources and energy conservation projects as items that may be acquired with bond proceeds in section 4(1)(d) of the proposed initiative is not consistent with the purpose stated in section 2 of the proposed initiative. Likewise, although section 2 of the proposed initiative clearly states that the purpose of the proposed initiative is to operate acquired hydroelectric generation facilities, that authority is not specifically reflected in the powers and duties of the Commission as enumerated in section 4 of the proposed initiative.

I recommend that the portions of section 4 of the proposed initiative delineating the powers and duties of the Board of Examiners be placed in a separate section to clearly distinguish the Board's powers and duties from those granted to the Montana Public Power Commission.

The text of the proposed initiative does not contain a codification instruction. A codification instruction is not required but can be used to incorporate certain provisions of present law into a bill. A codification instruction can also be used to limit the discretion of the Code Commissioner as to which provisions of the initiative to codify as "comprising laws of a general and permanent nature" as provided in section 1-11-204(3)(a), MCA. See page 57 of the Bill Drafting Manual for a discussion of codification instructions.

An effective date section is not included in the proposed initiative. Section 13-27-105(1), MCA, provides that unless the measure contains an effective date, a statutory initiative is effective on October 1 following approval. Without a specific effective date, if the proposed initiative were approved by the voters, the measure would become effective October 1, 2003. The 58th Legislature would be adjourned before the initiative became effective. There would be no effective statutory direction to the 2003 Legislature to implement the initiative until the Legislature convened in January 2005. Because of the necessity of implementing the Montana Public Power Commission in section 3 of the proposed initiative with additional legislation, such as establishing districts, providing for the election of members, and establishing terms of office, actual implementation of the Commission could be delayed until the election in November 2006.

SUBSTANTIVE ISSUES

For the purpose of analyzing the substance of the proposed initiative, the rules applicable to the interpretation of initiatives are the same as those applying to legislation enacted by the Legislature. See *State Bar of Montana v. Krivec*, 193 Mont. 477, 632 P.2d 707 (1981), and *State ex rel. Palmer v. Hart*, 201 Mont. 526, 655 P.2d 965 (1982). My review of the proposed initiative raises several substantive issues that I will address sequentially.

Advisory Measure -- Special Legislation

Article III, section 4(1), of the Montana Constitution provides that the people may enact laws by initiative on all matters except appropriations of money and local or special laws. The substance of the proposed initiative directs the newly created Montana Public Power Commission to conduct an assessment of existing hydroelectric generation facilities and to determine those that are in the public interest to acquire. The Montana Public Power Commission is then required to

either purchase the facilities or condemn the facilities. The Montana Public Power Commission is also required to sell electrical energy to customers with a specified priority and to reimburse taxing units for lost revenue associated with the acquisition of the hydroelectric generation facilities. However, section 3 of the proposed initiative, establishing the Montana Public Power Commission, cannot be implemented until the Legislature enacts additional legislation as discussed in the effective date discussion of the style issues analysis. If the proposed initiative is approved by the voters, nothing could be done to implement the purpose of the initiative, as stated in section 2, unless the Legislature acted to adopt additional laws to implement the Montana Public Power Commission. In *State ex rel. Harper v. Waltermire*, 213 Mont. 425, 691 P.2d 826 (1984), the Montana Supreme Court reviewed a proposed constitutional initiative that, if adopted by the voters, would have amended the Montana Constitution to direct the 1985 Legislature to adopt a resolution requesting Congress to call a constitutional convention for the sole purpose of adopting a balanced budget amendment. It also would have required that if the resolution was not adopted within 90 legislative days, the Legislature would remain in session without pay until the resolution was adopted. The Supreme Court, in granting injunctive relief, held that although the initiative was a constitutional amendment in form, it was in substance a legislative resolution. The Court held that the initiative power conferred by the Montana Constitution does not include the power to enact a legislative resolution. The electorate cannot circumvent the Montana Constitution by indirectly doing that which can be done directly.

It is arguable that because the proposed initiative cannot be implemented unless the Legislature acts, the proposed initiative is in essence a resolution or statement of sentiment from the people to the Legislature. A resolution or statement of sentiment is not a "law" within the meaning of Article III, section 4(1), of the Montana Constitution and is therefore not the proper subject of an initiative. In light of this concern, you may wish to make the initiative self-executing.

As pointed out earlier, Article III, section 4(1), of the Montana Constitution prohibits the enactment of special legislation by initiative. That is a more stringent restriction than is contained in Article V, section 12, of the Montana Constitution applying to the Legislature. A special statute within the meaning of the Montana Constitution is one that relates to particular persons or things of a class, one that is made for individual cases and for less than a class, or one that relates and applies to particular members of a class either particularized by the express terms of the act or separated by any method of selection from the whole class to which the law might, but for the limitation, be applicable. *State ex rel. Powell v. State Bank of Moore*, 90 Mont. 539, 4 P.2d 717 (1931). A law that operates in the same manner upon all persons in like circumstances is not "special" in the constitutional sense. *Linder v. Smith*, 193 Mont. 20, 629 P.2d 1187 (1981). A statute that is general and operates uniformly and equally on all persons in Montana is a general law, not local or special legislation in the constitutional sense. *Palmer v. State*, 191 Mont. 534, 625 P.2d 550 (1981). The most directly analogous case to the proposed initiative is *Grossman v. State*, 209 Mont. 427, 682 P.2d 1319 (1984).

In *Grossman*, an action was brought seeking to determine the validity of several acts of the Legislature allowing the issuance of state revenue bonds. The bonds would be financed by coal severance taxes to provide proceeds for development of state water resources. The challengers contended that the appropriation of funds for favorable loans to a score of small municipalities,

water districts, and portions of counties constituted special legislation and was unconstitutional. The Montana Supreme Court noted that Article V, section 12, of the Montana Constitution is not absolutely prohibitory, although Article III, section 4(1), of the Montana Constitution is absolutely prohibitory. The Court noted that the Legislature cannot draft a general act of statewide application providing for the issuance and sale of revenue bonds and at the same time keep a handle on the way the proceeds are to be spent or loaned except through its direct authorization of projects. The Court held that the passage of Chapter 705, Laws 1983, was an implementation of Title 85, chapter 1, part 6, MCA, and did not exclude any class of governmental entity. Therefore, those enactments were "general" legislation within the meaning of Article V, section 12, of the Montana Constitution. The Court also held that sections 5 and 6 of Chapter 705, Laws of 1983, were valid in any event because even though local in effect or "special", these were provisions for which a general act could not be provided.

The proposed initiative apparently applies only to hydroelectric generation facilities, although section 4(1)(d) of the proposed initiative indicates otherwise. The priority for sales of electrical energy from state-acquired facilities to certain customers may constitute prohibited special legislation. In addition, if the acquired hydroelectric generation facilities are operated by the state, the provisions of section 5 concerning the rights of employees of facilities may constitute special legislation. It would appear that the rights of state employees employed at hydroelectric generation facilities are likely to be different from those of all other state employees. You may wish to peruse the provisions of section 57, Chapter 585, Laws of 2001, concerning the transfer of certain county employees to state employee status.

Delegation of Authority

Section 4 of the proposed initiative directs the Montana Public Power Commission to conduct an assessment of existing hydroelectric generation facilities and determine those "which are in the public interest for the state of Montana to acquire". There are no standards contained in the proposed initiative that the Commission is to apply in determining public interest. When the Legislature confers authority on an administrative agency, it must lay down the policy or reasons behind the statute and also prescribe standards and guides for the grant of power given to the agency. *Douglas v. Judge*, 174 Mont. 32, 568 P.2d 530 (1977). See also *In re Gate City Savings & Loan Association*, 182 Mont. 361, 597 P.2d 84 (1979). *Grossman* also contains an excellent discussion of adequate standards or limits on the discretion of an Executive Branch agency. In *Grossman*, the Montana Supreme Court found that sections 85-1-501 and 85-1-502, MCA, imposed standards with reasonable clarity.

In addition, section 4(3) of the proposed initiative provides that the Montana Public Power Commission and the Board of Examiners have all powers necessary and convenient to carry out the duties in subsections (1) and (2). When it is possible for the law to specify the powers and duties, it should do so in order to avoid the delegation of authority issue. Constitutional law does not allow for an administrative board to legislate the limits of its own power, which in this case it would be required to do in order to give some meaning to the terms of the proposed initiative. See *White v. State*, 233 Mont. 81, 759 P.2d 971 (1988). You may wish to look to the provisions of sections 25 through 28 of Chapter 577, Laws of 2001, enacted by House Bill No. 474, and

codified as sections 69-9-111 through 69-9-114, MCA, for an example of the specific authority needed to issue revenue bonds.

Condemnation Authority -- Impairment of Contract-- Commerce Clause

Section 4(1)(b) of the proposed initiative authorizes the Montana Public Power Commission to use the power of eminent domain, if necessary, to acquire hydroelectric generation facilities, dams, real or personal property rights, equipment, contract rights, and associated water rights in a manner consistent with the provisions of Title 85, chapter 1, part 2, MCA. Section 85-1-209, MCA, authorizes the Department of Natural Resources and Conservation to acquire by condemnation, in accordance with Title 70, chapter 30, MCA, any land, rights, water rights, easements, franchises, and other property considered necessary for the operation and maintenance of state waterworks. Title 70, chapter 30, MCA, contains the general laws governing the exercise of the power of eminent domain. Section 70-30-102, MCA, enumerates the public uses for which the power of eminent domain may be exercised. Included in the list of public uses are property and water rights necessary for waterworks as provided in sections 85-1-209 and 85-7-1904, MCA, and electrical energy lines. Section 70-30-103, MCA, enumerates the property that may be taken in an eminent domain proceeding, and section 70-30-104, MCA, enumerates the estates and rights in land that may be taken for a public use. As part of the general revision of eminent domain laws enacted by Chapter 125, Laws of 2001, the Legislature amended section 70-30-102, MCA, to include a comprehensive list of all statutorily enumerated public uses. If the authority contained in section 4 of the proposed initiative is broader than the authority contained in sections 85-1-209 and 85-7-1904, MCA, then you should amend section 70-30-102, MCA, to conform to the establishment of the comprehensive list established by Chapter 125, Laws of 2001.

The ability to condemn water rights has long been recognized in Montana. See *Prentice v. McKay*, 38 Mont. 114, 98 P. 1081 (1909), and *Carlson v. City of Helena*, 39 Mont. 82, 102 P. 39 (1909). The police power of the state, which enables the state to pass laws for the health, safety, and general welfare of the people, must be reasonably adapted to its purpose and must injure or impair property rights only to the extent reasonably necessary to preserve the public welfare. See *In the Matter of the Adjudication of the Existing Water Rights of the Yellowstone River*, 253 Mont. 167, 832 P.2d 1210 (1992), citing *Yellowstone Valley Electric Cooperative v. Ostermiller*, 187 Mont. 8, 608 P.2d 491 (1980). However, section 70-30-103(1)(c), MCA, provides that property that is already appropriated to a public use may not be taken unless for a more necessary public use than that to which the property has already been appropriated. Under this standard, it may be difficult for the state to show a "more necessary" public use. In *City of Missoula v. Mountain Water Company*, 228 Mont. 404, 743 P.2d 590 (1987), the City attempted to take a water supply and a privately owned water system by eminent domain. The City passed an ordinance and a resolution authorizing the taking of the water supply and water system. The City contended that the necessity for the taking was conclusively presumed based upon the ordinance and resolution. The District Court disagreed, and the Supreme Court upheld the District Court. The Supreme Court reaffirmed that "necessary" as used in section 70-30-111, MCA, means a reasonable, requisite, and proper means to accomplish the improvement. The Supreme Court discussed the wide range of considerations that can be used in determining

whether a proposed public use is more necessary than the present use. The District Court made detailed findings listing the reasons for concluding that the City did not prove that it was necessary to acquire the water system. The findings included the effect on Mountain Water employees, the effect on public savings on rates and charges, the effect on cooperation between the City and the company, and the effect of having the company's home office in Missoula. The Supreme Court found that the District Court had erred in excluding evidence concerning profit, the out-of-state ownership of Mountain Water, and the votes of the people and the City Council. The Supreme Court determined that the evidence concerning private versus public ownership was pertinent to determining whether the public interest required the taking under section 70-30-111, MCA, as broadly drafted and defined. The Supreme Court held that because section 70-30-111, MCA, gives the District Court the power to determine whether a taking is necessary, the votes by the people and the City Council could not be finally dispositive of the issue of necessity. The Supreme Court determined that the votes had to be considered and weighed with other factors in determining the necessity of the taking. The Supreme Court expressed regret that section 70-30-111, MCA, does not set forth all of the issues that are appropriate for consideration on the necessity for a taking or the weight to be given to the various factors. The Supreme Court did point out that the City has the burden of proving that the taking was necessary by a preponderance of the evidence. On remand, the District Court again concluded that the City had failed to prove the necessity for the taking. In a second appeal, in *City of Missoula v. Mountain Water Company*, 236 Mont. 442, 771 P.2d 103 (1989), the Supreme Court upheld the District Court's determination. In that case, many additional offers of evidence by the City were precluded by the law of the case.

Generally, the power of a state to take private property is as broad as the state's police power. See *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). Authority from other jurisdictions authorizes the condemnation of a private utility by a public entity. In *Emerald People's Utility District v. Pacific Power & Light Company*, 729 P.2d 552 (Ore. 1986), a public utility district was authorized to condemn a private utility. The Oregon Constitution authorizes the creation of public utility districts and authorizes the districts to condemn property. In *Emerald,* an Oregon statute also authorized the state or a municipality to take over power generation facilities at a "net investment" cost. See also *Puget Sound Power & Light Company v. Public Utility District No. 1 of Whatcom County*, 123 F.2d 286 (9th Cir. 1941). The condemnation of a private utility by a town was approved in *Town of Massena v. Niagara Mohawk Power Corporation*, 382 N.E.2d 1139 (C.A. N.Y. 1978). In *State ex rel. Washington Water Power Company v. Superior Court for Chelan County*, 208 P.2d 849 (Wash. 1949), a Washington public utility district was authorized to take the Chelan hydroelectric generating plant, transmission lines, and certain licenses issued by the Federal Power Commission issued in 1926 and set to expire in 1976. The Washington Supreme Court noted that 16 U.S.C. 807, specifically reserves to states and municipalities the authority to take over, maintain, and operate any project licensed under Title 16, chapter 12, U.S.C., through a condemnation action.

I am unaware of any Montana case in which contract rights have been specifically condemned. However, while the majority decision in *City of Missoula I* appears to lead to the conclusion that by condemning a privately owned water supply in favor of a publicly owned water supply, the contracts of the privately owned company could be impaired, the Court did not specifically

address that issue. On the surface, the condemnation of contract rights would appear to be a direct violation of Article II, section 31, of the Montana Constitution and Article I, section 10, of the United States Constitution prohibiting the impairment of contracts. However, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the United States Supreme Court held that *Congress* has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties. In Montana, the Montana Supreme Court has adopted a three-part test to determine whether legislation has violated the impairment of contracts clause of the Montana Constitution: (1) does state law, in fact, operate as a substantial impairment of the contractual relationship; (2) if the legislation substantially impairs the contractual rights, the state, in justification must have a significant and legitimate public purpose behind the regulation; and (3) the adjustment of rights and responsibilities of the contracting parties must be based upon reasonable conditions and be of a character appropriate to the public purpose justifying the legislation. See *Western Energy Company v. Genie Land Company*, 227 Mont. 74, 737 P.2d 478 (1987). While I am not aware of a decision specifically determining a *state's* authority to affect contractual commitments through economic legislation, *Hawaii* and *Puget Sound* appear to authorize the taking of a private utility, which would of necessity take the private utility's contracts either directly or indirectly. That conclusion is also consistent with the application of 16 U.S.C. 807 specifically authorizing states to take federally licensed generation facilities.

The ability to acquire an electrical energy contract through eminent domain also has implications as being an attempt to regulate interstate commerce in violation of Article I, section 8, clause 3, of the United States Constitution. For example, in *City of Oakland v. Oakland Raiders*, 220 Cal. Rptr. 153 (1986), the City's attempt to acquire a National Football League franchise by eminent domain was declared invalid under the commerce clause. The *Oakland* court noted that the use of eminent domain has traditionally concerned real property and therefore rarely implicates commerce clause considerations. However, in *Elberton Southern Railway Company v. State Highway Department*, 89 S.E.2d 645 (Ga. 1955), it was held that the power of eminent domain may be exercised even though interstate commerce may be directly or incidentally involved. Because Congress has specifically authorized states to take federally licensed generation facilities, the taking of licensed hydroelectric generation facilities should be able to withstand a commerce clause challenge.

Revenue Bonds -- Appropriation

In *Fickes v. Missoula County*, 155 Mont. 258, 470 P.2d 287 (1970), the Montana Supreme Court had the opportunity to discuss revenue bonds. In *Fickes* the Court gave several examples of revenue bond issues where the Court had universally held that revenue bonds did not create a debt or liability within the meaning of Article XIII, section 5, of the 1889 Montana Constitution. Article VIII, section 8, of the 1972 Montana Constitution contains the current constitutional restrictions on state debt, and Article VIII, section 10, of the 1972 Montana Constitution requires the Legislature to establish debt limits for local government. The Court noted that the common quality of each project was that there is an explicit provision that the public body issuing the bonds does not obligate its taxing power to pay for them. Inherent in the concept of revenue bonds is the presumption that the facility financed will generate sufficient revenue to pay the

principal and interest on the bonds issued for that facility. Section 4(1)(d) of the proposed initiative authorizes the Montana Public Power Commission to use the proceeds of revenue bonds to invest in energy conservation projects as defined in 90-4-102, MCA. While reducing the waste or consumption of energy is a laudable purpose, I do not see how an energy conservation project will generate revenue to pay the principal and interest on bonds issued for that purpose. In addition, as I noted earlier, the provisions of section 4(2) of the proposed initiative do not authorize the Board of Examiners to issue bonds for either energy conservation projects or alternative renewable energy sources even though section 4(1)(d) authorizes the use of bond proceeds for those purposes.

As indicated in the discussion on advisory measures and special legislation, Article III, section 4(1), of the Montana Constitution provides that the people may not enact laws by initiative on matters involving appropriations. Section 17-7-502(4), MCA, provides that there is a statutory appropriation to pay the principal, interest, premiums, and costs of issuing, paying, and securing all bonds, notes, or other obligations, as due, that have been authorized and issued pursuant to the laws of Montana. I do not believe that a law authorizing the issuance of bonds violates Article III, section 4(1), of the Montana Constitution. It is my opinion that the statutory appropriation is triggered after the bonds are issued and payments become due pursuant to the terms of the bonds. My opinion is premised upon Article VIII, section 8, of the Montana Constitution specifically authorizing state debt to be created by a majority of the electors voting on that issue. If voters can approve the issuance of general obligation bonds for which the full faith, credit, and taxing power of the state is pledged, then it follows that the voters should be able to approve the issuance of revenue bonds. Because the Constitution specifically allows voters to approve debt and prohibits voters from appropriating funds, it necessarily follows that the approval of the issuance of bonds does not constitute an appropriation of funds. I raise this issue because of the controversy concerning appropriations in the initiated referendum on House Bill No. 474.

Statutory Conflict or Duplication

As pointed out on page 4 of the 2000 Bill Drafting Manual, the importance of reviewing existing statutes in the area of law to which the bill draft relates cannot be overemphasized. This step is necessary to avoid conflict, overlap, or redundancy in state law. As you are no doubt aware, the 2001 Legislature passed House Bill No. 474, which was enacted as Chapter 577, Laws of 2001. Among other things, House Bill No. 474 created the Montana Power Authority. Section 69-9-108(1)(b), MCA, provides that the Montana Power Authority may purchase and operate electrical generation facilities. Section 69-9-108(1)(d)(ii), MCA, authorizes the Montana Power Authority to use the proceeds of revenue bonds for that same purpose. Section 69-9-111, MCA, specifically authorizes the Board of Examiners to issue $500 million of revenue bonds for the purposes authorized in section 69-9-112, MCA. Section 69-9-112, MCA, authorizes the revenue bond proceeds to be used to purchase electrical generation facilities and associated water rights for those facilities. That is the exact authority delegated to the Montana Public Power Commission in section 4(1)(a) of the proposed initiative. It does not appear to be good public policy to have two state entities attempting to purchase the exact same property for the exact same purpose. It also appears unwise to authorize $1 billion of revenue bonds when $500 million appears to be sufficient. While I am aware that an initiated referendum on House Bill

No. 474 has qualified for the ballot in November 2002, I am unwilling to speculate on the outcome of that election. I recommend that your proposed initiative either amend or repeal sections 69-9-101 through 69-9-103, 69-9-107, 69-9-108, and 69-9-111 through 69-9-115, MCA. The amendment or repeal should contain a contingency based upon the retention or rejection of House Bill No. 474.

Placement of Commission

Article VI, section 7, of the Montana Constitution requires all administrative offices, boards, bureaus, commissions, agencies, and instrumentalities of the Executive Branch, except for the offices of statewide elected officials, to be allocated to not more than 20 principal departments. Section 2-15-104, MCA, lists the Executive Branch agencies of state government. Unless you intend to have the Montana Public Power Commission, created in section 3 of the proposed initiative, constitute a separate agency, you need to attach the Commission to an existing Executive Branch agency. If you intend that the Commission constitute a separate agency, you should amend section 2-15-104, MCA, to enumerate the Commission as an agency. Section 2-15-121, MCA, describes the effect of attaching an entity to an agency for administrative purposes only. See section 69-9-107(7), MCA, attaching the Montana Power Authority to the Department of Natural Resources and Conservation for an example of how to achieve attachment of an entity to an Executive Branch agency for administrative purposes.

Employee Rights

Section 5 of the proposed initiative provides that each person employed by a hydroelectric generation facility acquired by the state under section 4 of the proposed initiative is entitled to all rights that the person possessed as an employee before ownership of the facility was transferred to the state. The potential special legislation issues concerning section 5 are discussed in that portion of the analysis. In that portion of the analysis, I stated that it would appear that if the hydroelectric generation facilities are operated by the state, then the rights of state employees employed at hydroelectric generation facilities are likely to be different from those of all other state employees. If that is the case, an equal protection argument can be raised by the employees who hold fewer rights. For example, in *Oberg v. City of Billings*, 207 Mont. 277, 674 P.2d 494 (1983), a provision of state law providing that public law enforcement agencies were not covered by the law forbidding private and public employers from requiring a lie detector test as a condition of employment or continued employment violated the right of employees of law enforcement agencies to equal protection under Article II, section 4, of the Montana Constitution. You may wish to include at least the rational basis for the potential classification of employees in the proposed initiative.

It may be extremely expensive for the state to protect pension rights earned in private employment. In addition to pension rights, it is likely that collective bargaining agreements exist between the employees of the facility and the owners of the facility. Collective bargaining for public employees is governed by Title 39, chapter 31, MCA. Section 5 of the proposed initiative

appears to extend the rights held under a bargaining agreement with a private employer to potential state employees in perpetuity. The equal protection issues would also apply to this situation.

The state may also wish to operate acquired hydroelectric generation facilities through a contractual relationship. Any contract entered into by the state would require the state and apparently the contracting entity to comply with the terms of section 5 of the proposed initiative. In order to facilitate the development and administration of a contract, you may wish to consider the enumeration of the specific rights that are intended to be protected by section 5 of the proposed initiative.

As I noted in discussing style issues, although section 2 of the proposed initiative clearly states that the purpose of the proposed initiative is to operate acquired hydroelectric generation facilities, that authority is not specifically reflected in the powers and duties of the Montana Public Power Commission as enumerated in section 4 of the proposed initiative. That oversight should be remedied.

I have attached revised text for the initiative, but I have not made any of the specifically listed style changes, other than placing the powers and duties of the Board of Examiners in a separate section, or any of the listed legal or substantive changes discussed in this letter. I have incorporated the numerous "minor" style changes.

Please note that pursuant to section 13-27-202(1)(d), MCA, you are required to respond in writing to this office accepting, rejecting, or modifying the recommended changes before submitting a sample sheet of the petition to the Secretary of State. Your response will terminate the role of this office in this process. Further correspondence should be submitted to the Secretary of State.

Sincerely,

Gregory J. Petesch
Director of Legal Services

If you accept the suggested "minor" editorial and stylistic changes, the revised text of your proposed initiative would read as follows:

BE IT ENACTED BY THE PEOPLE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Short title.** [Sections 1 through 6] may be cited as the "Montana Hydroelectric Security Act".

NEW SECTION. **Section 2. Purpose.** The purpose of [sections 1 through 6] is to acquire hydroelectric generation facilities that are in the public interest and operate them for the benefit of the people of Montana.

NEW SECTION. **Section 3. Montana public power commission -- composition -- procedures.** There is a Montana public power commission that consists of a five-member citizen board. Each board member must be elected and must be a qualified elector from the district from which the member is elected. Each member must be from a separate district of the state. The districts must correspond to the districts for members of the Montana public service commission as provided for in 69-1-104. The election of members must be implemented as provided by law.

NEW SECTION. **Section 4. Powers and duties.** (1) The Montana public power commission shall conduct an assessment of existing hydroelectric generation facilities and determine those that would be in the public interest for the state of Montana to acquire. For those facilities determined to be in the public interest to acquire, the Montana public power commission shall:

(a) purchase at fair market value any hydroelectric generation facilities with an installed capacity of greater than 5 megawatts located in the state, including dams, real and personal property, equipment, contract rights, and water rights associated with those facilities, except for those facilities that have been designated as sites requiring potential cleanup under state or federal hazardous waste or hazardous substances laws;

(b) if necessary, use the power of eminent domain to acquire at fair market value hydroelectric generation facilities, dams, real or personal property, equipment, contract rights, and associated water rights;

(c) sell electrical energy at a retail or wholesale level, provided that customers who reside in an area that was served by an investor-owned utility with its entire service territory in the state of Montana prior to January 1, 1997, and customers with an average individual metered demand of less than 1 megawatt have priority;

(d) utilize proceeds from the issuance and sale of revenue bonds by the board of examiners in order to purchase or otherwise

acquire investments in hydroelectric generation facilities and in alternative renewable energy sources and projects for energy conservation as defined in 90-4-102;

(e) reimburse any loss of revenue to any taxing unit, as defined in 15-1-101, associated with the acquisition of any hydroelectric generation facility and any associated real or personal property or distribution or transmission facilities. Reimbursement of local governments must be implemented as provided by law.

(2) The Montana public power commission has all powers necessary and convenient to carry out the duties set forth in subsection (1).

NEW SECTION. **Section 5. Rights of employees of hydroelectric generation facilities.** Each person employed by a hydroelectric generation facility acquired by the state of Montana under [section 4] is entitled to all rights that the person possessed as an employee before the ownership of the facility was transferred to the state.

NEW SECTION. **Section 6. Revenue bonds.** The board of examiners shall issue revenue bonds as necessary for the acquisition of hydroelectric generation facilities, real or personal property, and water rights set forth in [section 4] in an amount up to $500 million. The board of examiners has all powers necessary and convenient to carry out the duties set forth in this section.

Appendix C

INITIATIVE NO. 145

A LAW PROPOSED BY INITIATIVE PETITION

This initiative creates an elected public power commission to determine whether purchasing hydroelectric dams in Montana is in the public interest and repeals the Montana Power Authority created by the 2001 legislature. The commission could negotiate to purchase the dams or, if necessary, use the power of condemnation to acquire the dams at fair market value. To pay for the dams, the state could issue $500 million in bonds to be repaid by the sale of generated electricity. Montana's small consumers would get priority to purchase the electricity. The commission also may invest in renewable energy and conservation projects.

Costs for assessing if acquisition of one or more hydroelectric facilities is in the public interest could be from $6 to $12 million. Purchase price and other costs are undeterminable now.

- ☐ FOR creating a public power commission to purchase or condemn hydroelectric dams whose acquisition it determines to be in the public interest.

- ☐ AGAINST creating a public power commission to purchase or condemn hydroelectric dams whose acquisition it determines to be in the public interest.

The language above is the official ballot language. The arguments and rebuttals on the following three pages have been prepared by the committees appointed to support or oppose the ballot measure. The opinions stated in the arguments and rebuttals do not necessarily represent the views of the State of Montana. The State also does not guarantee the truth or accuracy of any statement made in the arguments or rebuttals.

The PROPONENT argument and rebuttal for this measure were prepared by Senator Ken Toole, Don Judge, and Thomas E. Towe.

The OPPONENT argument and rebuttal for this measure were prepared by Representative Roy Brown, Jerome Anderson, Tom Ebzery, Joe Mazurek, and Stan I. Dupree.

ARGUMENT FOR I-145

Electric Deregulation is a disaster. With deregulation, unstable energy prices and corrupt business practices now permeate the electric utility industry. California's energy crisis and the Enron scandal expose an industry out of control. Pennsylvania Power and Light (PP&L), the current owner of many of the dams on our rivers, is no exception. PP&L is now being investigated for price fixing by the Pennsylvania Power Commission. Further, it may be targeted for takeover by a huge German conglomerate.

What's the solution? A vote for I-145 will create an elected Public Power Commission to study whether the State should buy any of the dams. The Commission is authorized to buy them, using the power of eminent domain if necessary, and **Montanans could again be in control of our power and the water rights** that go with it.

How does I-145 help? It provides a stable and dependable power supply. Just like government-owned TVA, Bonneville Power and the State of Nebraska's publicly owned power, our power would be dependable once again, no longer subject to huge fluctuations of the market place where we compete with the enormous California power appetite.

But, how does it help me? A special preference is provided in I-145 to residential and small commercial users in Montana. Homeowners and Main Street businesses would not have to compete with big industries that can afford to pay more for their power.

How will local communities and workers be affected? I-145 specifically provides for reimbursement to local governments for any lost revenue. A special provision protecting existing dam employees is also included.

Are you sure the price of power will be cheaper? Without I-145, the market will drive prices for electricity higher and higher. Montanans will have to compete with Californians to buy power. Californians have more money and are used to paying more for power. With I-145, **we can recapture and retain the cheapest -- or nearly the cheapest – power in the United States.** We believe we can produce power for Montana residences and Montana businesses for nearly half of what it is costing us right now (check our web site at www.damcheapower.com).

What about the water rights and lands that were sold with the dams? The rights to use Montana's water and riverside lands are now controlled by a huge energy giant headquartered back east. They have no obligation to Montanans. That prospect is frightening, but **I-145 will recapture those water rights and lands.**

Stop the drain on Montana's economy. Hydro power from dams is historically cheaper and more reliable. It's one reason Montanans have always enjoyed nearly the cheapest and most dependable power in the United States – before deregulation. Now the dams are owned by giant out-of-state corporations. Huge profits from Montana's cheap hydro power will simply be shipped out of state unless we vote for I-145.

Don't take a chance on the market for your electricity. Don't rely on multi-national corporate management for your electricity. Please Vote for I-145. Thank you.

ARGUMENT AGAINST I-145

I-145 PROMISES A LOT – But if the state of Montana condemns privately owned dams and gets into the energy business itself – what will really happen?

- Will my electricity bill go up, or down?
- Will my taxes go up, or not?
- Will this be good for our economy, or bad?

A lot of Montanans have asked those questions – taxpayers, business, labor, ranchers and farmers – and they've all come up with the same answer. The "promise" of I-145, is higher electricity bills, higher taxes and another blow to our struggling economy.

That's why the Montana AFL-CIO, Montana Taxpayers Association, Montana Water Resources Association, Montana Chamber of Commerce, among others – all oppose I-145. Here's what they found:

I-145, AN EXPENSIVE NEW BUREAUCRACY
The first thing I-145 would do is put five new politicians in office, with no experience requirements whatsoever – and THEY ALONE will decide whether Montana should condemn and take over the dams.

$12 MILLION, AND COUNTING
The next thing this new bureaucracy would do is spend $12 million of our taxes on a "study." And if that's not enough money, I-145 lets them come back for more.

$500 MILLION, AND COUNTING
After that, those five politicians can spend $500 million in bonds, forcing private industry out and forcing the state into the volatile energy business. And ratepayers are on the hook for that $500 million.

ELECTRICITY RATES? WITH I-145, THE "SKY'S THE LIMIT"
I-145 sets NO limits on future electricity rates. Once the state is in the power business, it could raise our rates to cover the cost of the bonds, make up a budget deficit, or just to bring in more money.

HIGHER TAXES TOO
I-145 would drain $17 million from your local governments and schools – because that's how much money the state and counties would lose in taxes. The only way to make up that money is through higher taxes, or higher electricity bills.

I-145, BAD FOR JOBS AND THE ECONOMY
The state budget has already been slashed and we can expect more cuts next year. Low-paying jobs with no future are resulting in Montana's youth being its fastest growing export. We should be encouraging businesses to come into Montana, not kicking them out.

So here's what we know about I-145:
We know we'll be paying millions for a brand new state bureaucracy.
We know we'll be on the hook for $500 million in bonds and force the state into one of the riskiest businesses around.
We know I-145 will drain tax dollars from schools, health care and other essential services.

And here's what we don't know:
We *don't* know how high our electricity bills will go.
We *don't* know how much our taxes will go up.
We *don't* know how many businesses will say no to a Montana that says no to them.

That's the real promise of I-145 – a promise we just can't afford. That's why taxpayers, labor and business leaders, ranchers and farmers ask you – **Please vote NO on I-145.**

PROPONENTS' REBUTTAL OF ARGUMENT AGAINST I-145

ELECTRIC DEREGULATION – A LONG LIST OF BROKEN PROMISES

Big Corporations promised lower rates – **but a study done by energy expert Tom Schneider shows that electricity rates have actually gone up by $60 million per year with deregulation!**

Big Corporations promised more competition and customer choice – instead, Pennsylvania Power's deregulated monopoly has resulted in **rates for Montanans going up by $60 million per year!**

Big Corporations say Montanans will pay $12 million to study buying back the dams, a figure we believe is unrealistically high – **but they don't say giant out-of-state corporations have raised rates $60 million per year, a figure five times higher than their own estimated cost of evaluating the dams!**

Big Corporations charge that I-145 is bad for the economy, but don't want to admit their promise of a better economy through deregulation is a dismal failure – **and they certainly don't want to admit shipping $300 million in higher utility rates to giant out-of-state energy companies over five years is bad for the economy!**

Big Corporations say I-145 will drain local tax dollars. **Not true. I-145 fully reimburses local governments, but raising rates by $60 million will hurt Montana taxpayers!**

Trusting Big Corporations will cost Montanans $300 million dollars over five short years. **But with I-145 Montanans can evaluate and buy back the dams, the water rights and the lands bordering our rivers, and provide the energy to Montanans at the lowest rates possible.**

LET'S STOP THE DRAIN ON OUR ECONOMY – VOTE YES ON I-145

OPPONENTS' REBUTTAL OF ARGUMENT FOR I-145

Let's be clear, the state doesn't want to get into the power business, a few folks want to use I-145 to force the state into the power business. Here are some facts:

Fact: When the energy crisis hit the nation, Montana Power Company's rates, under **private ownership remained stable**, no increases, and dependable, no blackouts.

Fact: I-145 will cost dam employees, who prefer to remain in the private sector, their jobs and send a **"YOU'RE NOT WELCOME"** message to new businesses. That's why the **MONTANA**

AFL-CIO AND THE MONTANA CHAMBER OF COMMERCE OPPOSE I-145.
Fact: I-145 does not guarantee lower electricity rates. But by **squandering $12 million** on a study, **risking $500 million** in bonds, creating **an expensive new bureaucracy** and handing over our power supply to bureaucrats, I-145 virtually guarantees **higher electricity rates.**

Fact: Rights to Montana's water have nothing to do with dam ownership. There are strong, historic protections for our water rights. Responsible water users like the **MONTANA WATER RESOURCES ASSOCIATION OPPOSE I-145**.

Fact: Only NorthWestern Energy customers would get power from the dams, but 400,000 Montanans who buy power elsewhere will be equally taxed to pay for the I-145 boondoggle.

Fact: I-145 will cost the state **$17 million** in tax revenue **every year**, which means tax increases or budget cuts to make it up. That's why the **MONTANA TAXPAYERS ASSOCIATION OPPOSES I-145**.

Fact: I-145 will cost taxpayers and ratepayers millions of dollars at a time we can't afford it.

Oppose I-145. Vote NO. **Visit www.damriskybusiness.com.**

INITIATIVE REFERENDUM NO. 117

AN ACT OF THE LEGISLATURE REFERRED BY REFERENDUM PETITION

This proposal seeks a public vote on House Bill 474, passed by the 2001 Legislature. HB 474, among other things, changes provisions regarding the deregulation of the electricity industry. It extends the transition to full consumer choice of electricity providers to 2007. It directs the Public Service Commission to set consumer rates to ensure full recovery of all prudently incurred costs by power suppliers. It creates a public Power Authority to construct, finance, and operate electrical facilities funded by state bonds. The bill creates, but does not fund, a consumer support program to ensure the availability of affordable power.

It is not possible to determine the financial impact of this proposal due to the uncertainties in the electricity and bond markets.

☐ APPROVE House Bill 474, a bill that changes provisions of the deregulation of the electricity industry.

☐ REJECT House Bill 474, a bill that changes provisions of the deregulation of the electricity industry.

The language above is the official ballot language. The arguments and rebuttals on the following three pages have been prepared by the committees appointed to support or oppose the ballot measure. The opinions stated in the arguments and rebuttals do not necessarily represent the views of the State of Montana. The State also does not guarantee the truth or accuracy of any statement made in the arguments or rebuttals.

The PROPONENT argument and rebuttal for this measure were prepared by Senator Tom Beck and Representative Doug Mood.

The OPPONENT argument and rebuttal for this measure were prepared by Representative Michelle Lee, Lloyd D. Bender, and Caryl V. Miller.

ARGUMENT FOR HOUSE BILL 474
(Referred to voters by IR-117)

The voters of Montana are encouraged to vote to APPROVE House Bill 474.

House Bill 474 has already proven its value in protecting Montana consumers, as demonstrated in the recent Public Service Commission hearings.

The Public Service Commission (PSC) issued a ruling in June of this year that was widely regarded by Montana citizens and Montana editorial writers as being a landmark decision. The PSC denied the approval of five out of seven contracts that NorthWestern Energy Co. (the former Montana Power Co.) had presented to the PSC for inclusion in the default supply portfolio. The makeup of the default supply portfolio will determine the price that NorthWestern's customers will pay for electricity. The PSC decided that the five contracts that were rejected had not been "prudently incurred" and told NorthWestern that the contracts had to be redone. That decision has the potential to save the electricity ratepayers of Montana over $50 million over the next five years. The language that gave the PSC the authority for that decision is contained in House Bill 474. It would be absolutely foolish to deny this protection to electricity consumers by eliminating this language from Montana statute. Vote for approval of 474 so we can retain this protection.

The opponents of House Bill 474 say that the bill did not have an adequate public hearing. That is not true.

Over fifty bills dealing with energy policy were heard by various committees of the 2001 Legislature. Those committee hearings were advertised throughout the state, and the public was invited to participate and comment on each of these proposals. House Bill 474 was the result of work that was done by a conference committee in the last weeks of the 2001 legislative session. The conference committee analyzed those fifty bills. They took the best ideas from those fifty bills and amended them into HB 474 in order to create a cohesive energy policy for the state. As each bill was amended into HB 474, the conference committee again opened up the discussion to the public and asked for comments. HB 474 was also debated extensively in the Montana Senate and in the House of Representatives. There was adequate opportunity for public comment.

What does House Bill 474 actually do?

HB 474 includes eight different changes or additions to Montana energy policy. The most pertinent policy changes are as follows:

- Clarifies who the electricity "default supplier" is for all Montana consumers.
- Requires all public utilities to offer separately marketed "green energy" to consumers who choose to purchase energy that has been produced from renewable resources.
- Extends the Universal Systems Benefit Programs for two more years and requires that 6% of USBP money be spent to improve irrigation efficiency. The USBP also helps lowincome families with their power bills.
- Provides the PSC with guidelines for allowing electricity suppliers to recover "prudently incurred" costs.

HB 474 makes important and effective changes to Montana's energy policy. Vote for APPROVAL of HB 474.

ARGUMENT AGAINST HOUSE BILL 474
(Referred to voters by IR-117)

- **HB 474 should be rejected** because it has adverse consequences for every Montanan by shifting the financial risk from private investors to Montana taxpayers and ratepayers.

- HB 474 authorizes the state to make loans to build **highly speculative** electricity generating facilities and also **forces taxpayers to pay off those loans if any fail!**

- HB 474 authorizes a State Power Authority to get into the risky and volatile business of buying and reselling electricity, as well as building and running state-owned power plants and transmission lines, **similar to the multi-billon dollar California Plan that failed**.

- **HB 474 strips consumer protections for electricity rates**. Formerly, the Montana Public Service Commission regulated electricity rates.

- **HB 474 holds hostage residential and small business consumers** as a party to power contracts, which are based on an unstable market. Unregulated wholesale electricity suppliers now control supplies and prices in an unregulated monopoly.

- This Act risks putting the state and taxpayers into the energy business. It creates an independent Power Authority to construct, finance, and operate electrical facilities funded by the state.

- Prices have already increased, even though generation costs remain the same as before. The Flathead area already has been hit hard. **As of July 1, 2002, NorthWestern Energy has announced a typical residential bill increase of 9.96%.** That increase is a result of a 43% increase in supply rates.

- HB 474 will eventually affect almost every consumer of electricity as the deregulation process extends to more electricity utilities. Utilities such as Montana-Dakota Utilities have a longer time to begin the deregulation process.

- Montana prematurely passed deregulation legislation without adequate hearings or debate. Deregulation makes little sense in Montana. Montanans should be able to buy energy produced in this state at the most favorable price. **Under the current deregulation scheme, Montana consumers must bid against Californians and others for electricity generated in Montana, and at higher prices.**

- **Wiping the slate clean by rejecting HB 474, then passing a consumer-friendly, Montana-focused energy policy will benefit all Montana consumers.**

PROPONENTS' REBUTTAL OF ARGUMENT AGAINST HOUSE BILL 474

House Bill 474 authorizes the creation of a state Power Authority, but that is hardly a reason to reject the bill. HB 474 also authorizes the Power Authority to issue revenue bonds for financing the construction of new electricity generation and transmission lines.

These **revenue bonds do not put the Montana taxpayer at any risk.** The risk of revenue bonds is entirely borne by the revenue bond purchasers and investors, not the ratepayers or the taxpayers.

The Power Authority has never been activated and probably never will be activated. The Power Authority was created to assure the Montana electricity consumer that there would be competition in the electricity markets here in Montana. **Since HB 474 was passed by the legislature, power markets have stabilized** at rates that are more reflective of historic averages and competitive markets.

Residential electricity users are far better protected by competitive markets than they would be by increased regulations. HB 474 assures Montanans that competitive markets will exist.

Electricity produced in Montana will always be cheaper when sold in Montana than it would be if it has to be sent across hundreds of miles of transmission lines.

If voters reject HB 474, that does not "wipe the slate clean." It would return us to previously existing energy policies that do not give Montana residents the same level of protections.

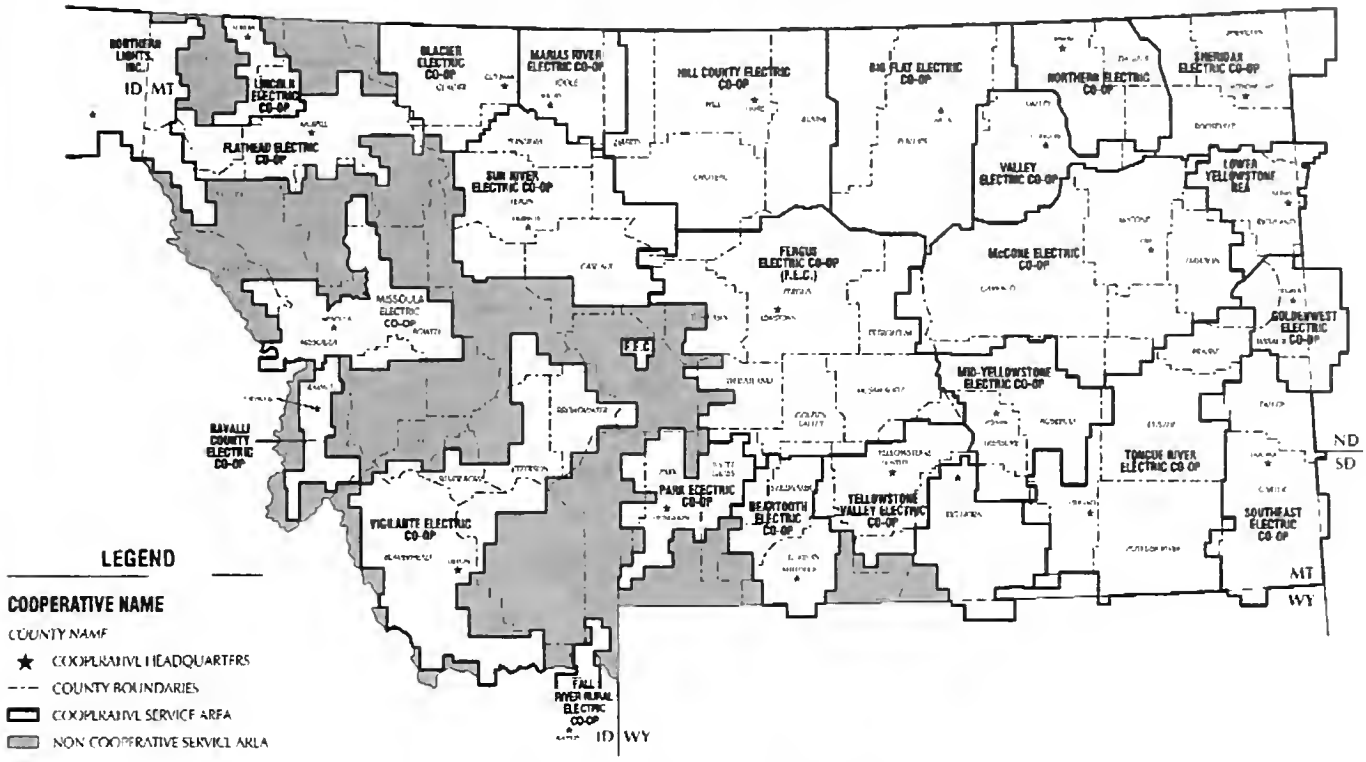
Vote to approve House Bill 474.

OPPONENTS' REBUTTAL OF ARGUMENT FOR HOUSE BILL 474

• **FACT – HB474 weakened the position of the Public Service Commission to fully regulate and oversee a consumer-friendly energy market.** The PSC does not have the power to deny contracts that were not put out for bids or that involve monopolistic prices. HB 474 requires the PSC to pass on to consumers the cost of energy bought by default suppliers via the "prudently incurred" costs mechanism – even if the energy is contracted in a monopolistic market.
• **FACT – HB474 never had a public hearing in its final, cobbled-together form.** Instead, 50 other legislative bills were merged into HB474 and it passed on the last day of the legislative session. **Consumer voices were never heard.** For an issue as important as energy, Montanans deserve better! **Reject HB 474. Wipe the slate clean,** and then pass a Montana-focused, consumer-friendly energy policy.
• **FACT** – The Universal Systems Benefit Program (USBP) must be revised and extended, as the **Transition Advisory Committee has already recommended to the 58th legislature. Before expiring July 31, 2003, the next legislature should renew the USBP.** The next legislature should pass separate alternative energy sources legislation and address the concerns of low income, alternative energy programs and irrigator funding separately; after all, energy is too important of an issue to continue to cobble together.
• **FACT – HB 474 puts the taxpayers at risk** for state loans and bonding for new electricity plants and should be rejected.

Appendix D

MONTANA RURAL ELECTRIC COOPERATIVES' SERVICE AREAS



ELECTRIC COOPERATIVES

Beartooth Electric, Red Lodge
Big Flat Electric, Malta
Fall River Rural Elec., Ashton, ID
Fergus Electric, Lewistown
Flathead Electric, Kalispell
Glacier Electric, Cut Bank
Goldenwest Electric, Wibaux
Hill County Electric, Havre
Lincoln Electric, Eureka
Lower Yellowstone REA, Sidney
Marias River Electric, Shelby
McCone Electric, Circle
Mid-Yellowstone Electric, Hysham
Missoula Electric, Missoula
Northern Electric, Opheim
Northern Lights, Inc., Sandpoint, ID
Park Electric, Livingston
Ravalli County Electric, Corvallis
Sheridan Electric, Medicine Lake
Southeast Electric, Ekalaka
Sun River Electric, Fairfield
Tongue River Electric, Ashland
Valley Electric, Glasgow
Vigilante Electric, Dillon
Yellowstone Valley Electric, Huntley

Appendix E

INTERLOCAL AGREEMENT FOR THE CREATION, ESTABLISHMENT AND GOVERNANCE OF THE MONTANA PUBLIC POWER AUTHORITY

This Interlocal Agreement for the Creation, Establishment and Governance of the Montana Public Power Authority ("Agreement"), dated and effective as of the Effective Date (defined below), is by and among the City of Missoula, Montana, the City of Great Falls, Montana, the City of Bozeman, Montana, the City of Billings, Montana, the City of Helena, Montana, and the consolidated city/county government of Butte-Silver Bow, Montana, and such other local governmental units as may become a party to this Agreement in accordance with its terms. Each of the foregoing local governmental units that authorize and approve this Agreement pursuant to an Effective Vote (hereinafter defined) are hereinafter referred to as an "Original Member" and collectively as the "Original Members." Unless otherwise defined in this Agreement, each capitalized term used in this Agreement shall have the meaning given in Article I.

RECITALS

WHEREAS, under Article XI, Section 6 of the Montana constitution, a local governmental unit with self-governing powers has the authority to Acquire and Develop electric and natural gas utilities within and outside the boundaries of such local governmental unit;

WHEREAS, Title 7, Chapter 1, Part 101, Montana Code Annotated holds that as provided by Article XI, section 6, of the Montana constitution, a local governmental unit, such as each Original Member, that is possessed of self-government powers may exercise any power not prohibited by the constitution, law, or charter, such powers to include (by way of example and not by way of limitation) those powers granted to general power governments;

WHEREAS, Title 7, Chapter 11, Part 1, Montana Code Annotated (the "Interlocal Cooperation Act") authorizes local governmental units to enter into interlocal agreements to perform any undertaking that any of the public agencies entering into the Agreement are authorized by law to perform;

WHEREAS, each of the Original Members, as a local governmental unit within Montana, has the desire, obligation or responsibility to secure, for themselves and for their respective citizens, adequate, reliable and low-cost electric and natural gas utility services; and

WHEREAS, the Original Members hereby find and determine that it is in their mutual interest to join with each other and with other local governmental units located throughout Montana to create a joint authority (by and through this Agreement as an interlocal agreement under the Interlocal Cooperation Act) for the purposes of undertaking and accomplishing the Acquisition (hereinafter defined) and Development (hereinafter defined) of the T&D Assets (hereinafter defined).

NOW THEREFORE each of the Original Members, and each other local government unit as may elect to participate in this Agreement and who may be authorized by the Board to become a Member, all as may be hereinafter provided (such parties collectively the "Members"), and in consideration of the mutual covenants and agreements of the Original Members, do hereby covenant, agree, acknowledge, establish, represent and warrant as follows:

ARTICLE I - DEFINITIONS

Unless otherwise defined in this Agreement, each of the following terms shall have the meaning set forth in this Article I.

1.1 *Acquisition, acquiring or acquire* shall include acquisition, purchase, securing, obtaining, lease, receipt by gift or grant, condemnation, transfer or other acquirement, or any combination thereof.

1.2 *Agreement* shall mean this Interlocal Agreement for the Creation, Establishment and Governance of the Montana Public Power Authority, dated and effective as of the Effective Date.

1.3 *Board or Board of Directors* shall have the respective meanings given such terms in Article IV.

1.4 *Code* means the Internal Revenue Code of 1986, as amended, together with corresponding and applicable final or temporary regulations and revenue rulings issued or amended with respect thereto by the United States Treasury Department or the Internal Revenue Service.

1.5 *Develop or Development* includes any one or more of the following: construction of, ownership of, remodeling, maintaining, equipping, re-equipping, repairing, financing, furbishing, refurbishing, holding and operating assets or properties.

1.6 *Effective Date* shall mean the date upon which a simple majority of the Original Members shall have taken all proper action under applicable law to authorize and approve to be bound to this Agreement. This Agreement shall be effective as of and on the Effective Date notwithstanding the fact that all of the herein recited Original Members may not have taken all proper action under applicable law to authorize and approve this Agreement. This Agreement shall be of no further force and effect in the event that the Effective Date is determined to occur on or after 12:01 a.m., May 4, 2004, Mountain Standard Time (i.e., in the event that by such date no simple majority of the Original Members shall have taken all proper action under applicable law to authorize and approve this Agreement). With respect to all Members who may authorize and approve this Agreement subsequent to the Effective Date, this Agreement shall be deemed to bind such Members as of the date of such authorization and approval by such Member; provided further, however, that each new Member's status as a Member shall be further subject to those approvals and confirmations of the Original Board or of the Original Members as required by Article IV hereunder. Notwithstanding the foregoing sentence with respect to Members, each Original Member which shall authorize and approve this Agreement shall be deemed to be bound to this Agreement as of the Effective Date.

1.7 *Effective Vote* shall mean any official action by any Original Member or by any Member to authorize and approve this Agreement.

1.8 Member shall mean any party to this Agreement, including, but not limited to, the Original Members.

1.9 MPPA shall mean the Montana Public Power Authority created and established pursuant to this Agreement, and any successor entity created and established by the MPPA or by the Members pursuant to an amendment and restatement of this Agreement.

1.10 NorthWestern Energy shall mean NorthWestern Energy, a division of NorthWestern Corporation and all affiliates thereof. Whenever the term "NorthWestern Energy" shall be used with respect to T&D Assets, the term shall be deemed to be inclusive of each corporate entity or entities affiliated with, or under common control with, NorthWestern Corporation, it being the intention of the Original Members that the term T&D Assets set forth in this Agreement include the T&D Assets of NorthWestern Energy regardless of the actual corporate ownership of such assets.

1.11 Original Board shall have the respective meanings given such term in Article IV.

1.12 Original Members shall have the meaning set forth in the first paragraph of this Agreement.

1.13 Outstanding or Outstanding Obligation means, any obligation of the MPPA that has not yet been paid, retired, redeemed or legally defeased.

1.14 T&D Assets shall mean any and all assets hereinafter Acquired or Developed by the MPPA that may consist of, among other matters, natural gas and electric transmission and distribution systems, real and personal property, administrative systems and assets (including human resource assets), contract rights, accounts receivable, computer software, business assets, good will, and other items of real, personal, intellectual and intangible property. The Original Members by this Agreement intend that initially during the period of due diligence time immediately following the creation and establishment of the MPPA the term "T&D Assets" shall mean only the T&D Assets of NorthWestern Energy.

ARTICLE II – CREATION, NAME, PURPOSES, AND POWERS

2.1 Findings Regarding Creation and Establishment of Montana Public Power Authority. Pursuant to Article XI, Section 6 of the Montana constitution, pursuant to the charters and self-governing authorities and powers enjoyed by or possessed of any of the Original Members, and pursuant to the Interlocal Cooperation Act, the Original Members hereby find that they each individually and respectively have and enjoy all right, title, power and authority to form, create and establish, and such Original Members hereby do agree to form, create and establish, an authority to jointly pursue and exercise the purposes, powers, and duties as set forth below that any of the Original Members are independently capable of pursuing and exercising.

2.2 Creation and Establishment of the MPPA. Pursuant to the Interlocal Cooperation Act, there is hereby created a public entity separate and apart from that of each of the Members to be known as the Montana Public Power Authority, with such powers as are set forth in the Agreement. The creation and establishment of the MPPA herein-created shall be as of and on the Effective Date. Unless dissolved in accordance with the terms and provisions of this Agreement, the existence of the MPPA shall be perpetual.

2.3 Scope of Powers. In all of its actions and activities, the MPPA shall be entitled to exercise the power or powers and perform those acts that any one of the Members may themselves possess or perform in connection with the Acquisition and Development of T&D Assets. Notwithstanding the foregoing, and except as otherwise provided below, the MPPA shall be operated separately from the administrative structure or structures of any or all of the Members, and shall be governed solely and independently by a Board of Directors as provided below.

2.4 Purpose and Duties of MPPA. Under this Agreement, MPPA shall have the purposes and duties enumerated below.

a. To investigate the feasibility of Acquiring and Developing the T&D Assets.

b. If, after such investigation, a two-thirds ($2/3^{rds}$) majority of the Original Board determines that it is in the MPPA's best interest to pursue the Acquisition or Development of any or all of the proposed or identified T&D Assets, and subject to the initial financial limitations set forth in Article VIII, below, and to the extent (as anticipated by the Original Members) that the T&D Assets shall be those T&D Assets of NorthWestern Energy, which T&D Assets (as anticipated by the Original Members) remain subject to federal bankruptcy proceedings, the MPPA shall prepare and tender (or shall cause to be prepared and tendered) to the Official Committee of Unsecured Creditors and/or the United States Bankruptcy Court for the District of Delaware in Case No. 03-12872, as may be appropriate (and in each such other successor or ancillary legal proceeding), one or more term sheets, offers, letter of intent, proposals, or other appropriate pleadings, agreements, certificates, documents and instruments evidencing the MPPA's desire to Acquire or Develop some or all of the T&D Assets, and the proposed terms and conditions of the Acquisition or Development thereof.

c. If the proposal tendered by the MPPA shall be accepted, the MPPA shall commence on behalf of the Original Members, all appropriate due diligence activities and, if after exercising such due diligence, the Original Board determines to proceed with the Acquisition or Development of T&D Assets, to negotiate one or more legal agreements, documents or instruments concerning the same.

In this regard, the Original Members hereby acknowledge and agree that it may be necessary to amend and restate this Agreement in several respects in order to proceed with such Acquisition or Development.

d. Contemporaneously with the anticipated activities set forth in this Agreement, the MPPA shall be and hereby is empowered to Acquire and Develop the T&D Assets and to own, operate, manage and administer the same.

2.5 Delegation of Powers to MPPA. The Members hereby delegate the following powers to MPPA to the greatest extent allowed by law:

a. to operate and be governed by a Board of Directors selected in accordance with the provisions of this Agreement and any amendments to this Agreement, or any By-Laws (the "By-Laws") anticipated by the Original Members to be subsequently authorized and approved;

b. to establish a budget and make expenditures pursuant thereto, and to set assessments for each Member within the limits and on the conditions set forth in Article VIII;

c. to hire or retain employees, independent contractors, professionals, and other personnel as may be reasonably necessary to accomplish the purposes and duties of the MPPA;

d. to make an offer on behalf of the MPPA to purchase or otherwise Acquire and Develop some or all of the T&D Assets;

e. to pursue all appropriate due diligence activities as may be reasonably required in connection with the Acquisition and Development of the T&D Assets;

f. to incure debts, liabilities and obligations and to arrange for the offer, sale and issuance of bonds or other liabilities or debt obligations, which bonds, liabilities or other debt obligations may be secured by the T&D Assets and the revenues to be derived therefrom; provided, *however*, that each such bond or debt obligation issued by the MPPA and represented by a certificate or instrument shall contain on its face a statement substantially to the effect that (i) neither Montana, any municipality or local governmental unit thereof, or any other municipal corporation, quasi-municipal corporation, subdivision, authority or agency thereof is obligated to pay the principal or the interest arising thereon, (ii) no tax funds may be used to pay the principal or interest thereon; and (iii) neither any nor all of the faith and credit nor the taxing power of Montana, any municipality or local governmental unit thereof, or any other municipal corporation, quasi-municipal corporation, subdivision, authority or agency thereof, is pledged to the payment of the principal or the interest thereon;

g. to negotiate and enter into contracts, to perform contracts, to make covenants and representations, to convey and to receive legal rights, and to take such other actions as may be reasonably incident to the Acquisition or Development of the T&D Assets;

h. to pursue all governmental or regulatory review and approvals as may by required in connection with Acquiring and Developing the T&D Assets;

i. to propose and lobby for the enactment of such legislation as may be necessary to

provide for the effective operation of the MPPA and the effective Acquisition and Development of T&D Assets by the MPPA;

j. to Acquire, Develop, own, hold, furbish, refurbish, construct, reconstruct, sell, transfer, lease, bargain, convey, pledge, mortgage, devise, dispose or hypothecate (or cause to occur any of the foregoing through delegation or otherwise) the T&D Assets;

k. to: (i) Acquire and Develop the T&D Assets, and to engage in the provision of electric and natural gas transmission and distribution services in certain service areas upon accomplishing any Acquisition or Development of T&D Assets; (ii) to purchase, contract for, generate, or otherwise secure energy and capacity (provided, however, that nothing in this Agreement shall be interpreted or construed to prohibit or restrict any Member from generating or otherwise securing its own energy and capacity independently of the MPPA); (iii) construct, purchase and improve sources of electricity and natural gas; (iv) construct, purchase, and improve T&D Assets or other substantially similar, ancillary or related properties or assets; and (v) engage in all activities as may be required to provide customers with stable, secure and reasonably-priced supplies of electricity and natural gas;

l. to sue and be sued in its own name and its own right, to seek opinions of counsel, to request opinions of counsel or attorney general's opinions in Montana or otherwise, to institute, prosecute, defend or intervene in all such actions or proceedings to establish the validity of this Agreement, any powers granted herein, any authority or action of the MPPA, and any of the obligations sought to be undertaken by the MPPA;

m. to Acquire, hold or dispose of property, contributions and donations of property, funds, services and other forms of assistance from persons, firms, corporations and government entities and to receive contributions or donations of property, funds, services and other forms of assistance from any source;

n. to receive, collect, disburse and invest money or property;

o. to establish rates, to establish one or more systems composed of all or part of the T&D Assets, to establish one or more contract resource obligations with respect to all or any part of any of the T&D Assets;

p. to exercise such other powers as may be reasonably implied or necessary to undertake, accomplish or effect the various and several purposes set forth in this Agreement; and

q. to carry out all the provisions of this Agreement and the By-Laws.

2.6. Restrictions on Powers. Under this Agreement, the MPPA shall:

a. engage only in the activities which are enumerated above or such activities that are reasonably or necessarily implied from the activities enumerated above;

b. not allow any of its income and assets to be used for or inure to the benefit of any private person or corporation;

c. not directly obligate any Member without such Member's prior consent; and

d. not take any action or fail to take any action that is or would be in violation of the Montana constitution.

2.7 Payment in Lieu of Taxes. The MPPA shall make provision to compensate local governmental units within the state of Montana (and the state of Montana) for tax revenue loss associated with the MPPA ownership of the T&D Assets, in amounts and at such times as the Board determines to be appropriate under the circumstances.

2.8 Noncompetition. The Members each agree that during the term of this Agreement, no Member shall take any action (or permit any action to be taken by that Member or its agents) that would create a transmission or distribution service to be operated in a manner that would compete with the business of the MPPA.

ARTICLE III – MEMBERSHIP AND WITHDRAWAL

3.1 Representations. Each of the Original Members who shall make an Effective Vote in respect of this Agreement shall be deemed to have represented and warranted to all of the other Original Members and to MPPA as of the date of such Effective Vote that:

a. It is a self-governing municipality, or consolidated city-county government that is duly organized and validly existing under the laws of Montana.

b. The governing board, council, or commission of such Member has authorized and approved this Agreement by way of a resolution, ordinance or other official action that has been duly and validly adopted and that is legally effective.

c. It has power and authority to authorize and approve this Agreement and to perform its obligations arising hereunder.

3.2 Membership. The Original Members of the MPPA as of the Effective Date shall be those Original Members who shall make an Effective Vote. Membership in the MPPA shall be open to all cities, counties and consolidated city-county governments located within Montana and within the service territory (whether in whole or in part) of the distribution system represented by the T&D Assets, *provided, however*, that each admission to membership shall require the confirming approval of no less than three-fourths ($3/4^{ths}$) of the Original Board. New Members may be admitted as further set forth in the By-Laws. Notwithstanding anything in this Section 3.2, the Original Board shall have no power to approve the admission of a new Member except as set forth in Article IV of this Agreement.

3.3 Withdrawal. Any Member may withdraw from the MPPA upon ninety (90) days written notice to the Board for any reason whatsoever or for no reason; provided, however, that withdrawal from the MPPA shall not relieve a Member of its obligations for any liability incurred on account of its membership in the MPPA, including any amounts owed under any assessment made pursuant to Article VIII, or otherwise under any contract between the withdrawing Member and the MPPA. Further, such withdrawal by a Member may not cause the MPPA to violate or breach any covenant to third parties (such as creditors of the MPPA, including bondholders) without such third parties' prior written consent(s). Withdrawal shall not become effective until the withdrawing Member has discharged all of its duties and obligations to the MPPA up to the date of withdrawal.

ARTICLE IV - BOARD OF DIRECTORS

4.1 Powers. All of the powers delegated to MPPA shall be exercised by and under the authority of the Board, which shall conduct its business as provided herein.

4.2 Board of Directors. The Board shall consist of up to ten (10) representatives of the Members. The Original Members shall each have one (1) permanent seat on the Board; provided, *however*, that in the event less than six (6) of the Original Members make an Effective Vote, so many of the Original Members as make an Effective Vote shall each have one (1) permanent seat on the Board. Such of the representatives of the Original Members who shall constitute the original Board shall hereinafter be referred to as the "Original Board." The remaining seats on the Board after the representatives constituting the Original Board shall take their seats on the Original Board may be allocated to any Members which may later join the MPPA in the manner that a simple majority of the Original Board may approve, or as further established in the By-Laws. Notwithstanding the foregoing, the Original Board shall have no power to approve the applications for membership into the MPPA by other Members nor appoint any Director to any vacant seat on the Board (nor to authorize or approve any By-Laws that call for a vacant seat on the Board to be filled by any party other than the representative of an Original Member) until such time as the T&D Assets shall have been Acquired or until such earlier time as all Original Members shall unanimously agree. The qualifications, terms of service, duties, tenure, rights, privileges and obligations of those persons serving as Directors on the Board shall be as further set forth in the By-Laws, together with provisions concerning resignations, vacancies, voting matters and the like. Notwithstanding the foregoing, an Original Member may remove its representative serving on the Board, with or without cause, at any time. In no event shall a Director be other than an individual.

4.3 Meetings; Voting. Regular and special meetings of the Board shall be called and conducted in accordance with the provisions set forth in the By-Laws, or if none, as a simple majority of the Original Board may determine. For purposes of taking action at meetings of the Board, the Board shall be required to obtain a Quorum, as the same shall be set forth from time to time in the By-Laws (it being acknowledged and agreed that for purposes of the Original Board no less than four (4) such members of the Board shall constitute a Quorum). Each Director who shall serve on the Board shall carry and be empowered to cast one (1) vote at each regular or special meeting of the Board. Each vote or votes of a Director at any duly held meeting shall be conclusively deemed to be the vote for and on behalf of the Member or Members that he or she shall represent. The Board of the MPPA is expressly authorized to adopt, amend or repeal the By-Laws.

4.4 Compensation. No Director shall receive any compensation from the MPPA for the performance of his or her duties as a Director except that all Directors shall be reimbursed for all reasonable travel costs and expenses (included but not limited to costs and expenses associated with meals, lodging and transportation).

4.5 Personal Liability. The personal liability of the Directors who shall serve on the Board shall be and hereby is eliminated to the fullest extent permitted by Montana law. The MPPA is authorized and directed to indemnify (and advance expenses to) its Directors and officers to the fullest extent permitted by Montana law. The MPPA is authorized and directed to obtain directors' and officers' insurance policies and to enter into indemnification or contribution agreements with Directors. Neither the amendment, modification or repeal of this Section shall adversely affect any right or protection of a Director or officer of the MPPA with respect to any act or omission that occurred prior to the time of such amendment, modification, repeal or adoption.

4.6 Place and Manner of Meetings. All meetings, whether of the Board or of the Original Board, shall be open to the public. All official acts of the Board shall be by a regular or special meeting and by a majority of the Board. Meetings of the Board shall be held at such places, either within or without Montana, as the Board shall determine. Rather than holding a meeting at any particular place, the Board may determine that a meeting shall be held solely by means of remote communications, which means shall meet the requirements of applicable law.

ARTICLE V – OFFICERS

5.1 Officers. The MPPA shall have such officers as may be specified in the By-Laws.

5.2 Initial Officer. Until such time as the By-Laws shall be authorized and approved by the Board pursuant to Article VI of this Agreement, the Original Board may appoint an Executive Director who shall be delegated responsibility and authority for the activities of the MPPA.

ARTICLE VI - BYLAWS

6.1 By-Laws. The Board of the MPPA, acting with no less than a simple majority, shall authorize and approve By-Laws on or after the Effective Date to be effective as of the Effective Date and shall conduct its affairs in accordance with this Agreement and in accordance therewith. The By-Laws may be amended in the manner specified therein, which may be by less than a unanimous vote of the Directors but which in no event may be by less than a two-thirds ($2/3^{rds}$) majority. Notwithstanding the foregoing, the By-Laws may be amended at any time by a three-fourths ($3/4^{ths}$) majority vote of the Original Board.

6.2 Agreement Controls. In the event of any conflict between the terms and provisions of this Agreement and the terms and provisions of the By-Laws, this Agreement shall control.

ARTICLE VII -- DISSOLUTION AND AMENDMENT

7.1 Dissolution. Whenever, at a regular or special meeting for which notice stating the purpose has been given, a three-fourths ($3/4^{ths}$) majority of the Board shall determine that the purposes for which the MPPA was formed have been fulfilled, accomplished or otherwise completed the MPPA may be dissolved. Any such resolution of dissolution shall only be effective, and the MPPA shall only be dissolved, if: (i) the MPPA has no property to administer, other than funds or property, to be paid or transferred to a Member or other person prior to such dissolution in connection with such dissolution, and (ii) at the time of such dissolution all obligations of MPPA shall no longer be Outstanding and all such obligations shall have been satisfied or provision for the satisfaction thereof shall be made prior to the effective date of such dissolution. Thereafter, the Board shall liquidate the business of the MPPA and distribute the net proceeds (if any) to the Members in the most equitable manner possible.

7.2 Amendment. This Agreement may be amended only by a written instrument and only by a three-fourths ($3/4^{ths}$) of the Original Members.

ARTICLE VIII – CONTRIBUTIONS, ASSESSMENTS, BUDGET AND RATES

8.1 Initial Organizational Contributions and Initial Organizational Assessments. Each of the Original Members shall make an initial organizational contribution to MPPA in the amount indicated in Exhibit 1 to this Agreement, which Exhibit 1 is incorporated herein by this reference. Such initial organizational contributions shall be used by the MPPA to pay for costs and fees associated with

the exercise by the MPPA of its powers set forth in Section 2.5(c) or 2.5(d) of this Agreement. In addition, each local governmental unit becoming a Member shall make an initial organizational contribution in an amount as the Board may determine to be appropriate. The simple majority of the Board shall have the power to make further additional organizational assessments against each Original Member for the costs of organizing the MPPA and all costs reasonably associated with the exercise of the MPPA's powers as provided in Section 8.2 below. Provided however, that each such additional organizational assessment as among the Original Members shall be in equal proportion at all times (e.g., in the case of 6 Original Members who shall make an Effective Vote, $1/6^{th}$).

8.2 Contemplated Additional Organizational Contributions and Assessments; Powers of Original Board Related Thereto. Furthermore, and not by way of derogation of Section 8.1 of this Agreement, the Original Board shall have the power to make any necessary additional organizational assessment against each Member for the costs associated with the exercise by the MPPA of the powers set forth in 2.5(a) through 2.5(j) of this Agreement; provided, however, that the maximum additional organizational assessment (e.g., the maximum additional organizational assessment beyond those initial organizational contributions called for to be made under Section 8.1 above) imposed by the Original Board or the subsequent Board upon the Original Members for such costs associated with the exercise by the MPPA of its powers set forth in Section 2.5(e), (g) and (h) shall be $75,000 per Original Member, exclusive of the initial organizational assessments against the Original Members for costs previously imposed. It is the intention of the Original Members in setting forth this Section 8.2 that each Original Member's liability for all organizational assessments and contributions in aggregate (including the initial organizational contribution) arising under Section 8.1 and Section 8.2 shall not exceed the sum of $100,000, respectively, without further amendment to this Agreement by all Original Members.

8.3 Budget and Rates. In furtherance of the powers set forth in Section 2.5 of this Agreement, the MPPA shall authorize, approve and publish for the benefit of its Members an annual budget for its operations. To the extent allowed by law, the budget shall provide for rates and terms and conditions of service to all electric and natural gas customers served by the MPPA which shall be sufficient to: (i) meet operating costs; (ii) provide for appropriate debt service coverage (including maintaining an investment-grade credit rating) on any obligations of the MPPA that may be Outstanding; (iii) establish and maintain reasonable reserves; (iv) provide for adequate maintenance and investment; and (v) to provide for adequate and reliable service to customers.

8.4 Assessments. Unless otherwise required by law, the Board may not make assessments against Members for any of the items of cost that are to be recovered through rates as provided in Section 8.3 above. However, and only if and to the extent Members may by law become liable for payment or discharge of any obligation of MPPA, such liability shall be assessed against them by the Board in a ratio approved by the Board in its sole and absolute discretion, subject to the last sentence of Section 8.1 and the last sentence of Section 8.2 above.

ARTICLE IX - MISCELLANEOUS PROVISIONS

9.1 Bonds and Debt Obligations. Unless and to the extent the Members may otherwise unanimously agree, all bonds or other debt obligations approved to be offered, sold and issued by the MPPA shall be as approved by a simple majority of the Board. Such bonds or other debt obligations are presently contemplated for issuance in order to undertake and accomplish the anticipated Acquisition and Development of the T&D Assets. Such bonds or other debt obligations, to the extent issued, shall be obligations solely of the MPPA, and accordingly, without the express consent of individually effected Members, none of the Members shall be liable for the payment of the principal

of, premium (if any), or interest on such bonds or other debt obligations or for the performance of any other obligation that may be undertaken by the MPPA with respect thereto. The Members acknowledge that the Board shall take all reasonable best efforts to reimburse the Members for initial costs and assessments incident to the authorization and approval of this Agreement by such Members to the greatest extent permitted by the Code and other applicable law (and from proceeds of the proposed bonds, other debt obligations or otherwise).

9.2 Insurance. The Board shall procure and maintain insurance, self-insurance reserves, or both, in an amount sufficient to satisfy all liabilities reasonably foreseeable or otherwise incident to the operation of the MPPA.

9.3 Retirement System Contributions. With respect to its employees (if any), and to the extent required by applicable law, the MPPA shall be the party responsible for reports and payment of retirement system contributions pursuant to MCA § 19-2-506.

9.4 Effective as of the Effective Date. This Agreement shall become effective as of and on the Effective Date.

9.5 Administrator of Joint Undertaking. For purposes of MCA § 7-11-105, the Executive Director of the MPPA (or if none, such other chief executive officer of the MPPA established under the By-Laws) shall serve as the administrator responsible for administering the joint and cooperative undertaking among the Members to this Agreement. To the extent determined necessary to comply with MCA § 7-11-105 the Board shall serve as the "joint board" under this Agreement, otherwise, there shall be no "joint board" as that term is used in MCA § 7-11-105.

9.6 Supplemental Agreements. The Members agree to complete and execute all supplemental agreements, documents and instruments reasonably necessary or appropriate (in the opinion of a simple majority of the Board) to fully implement the terms of this Agreement.

9.7 Assignment. No Member shall assign any of its rights or delegate any of its duties arising under or by virtue of such Member's membership in the MPPA or pursuant to this Agreement without the express written approval of the Board.

9.8 No Third Party Beneficiaries. Except as expressly provided by this Agreement, the Members shall not be obligated or liable by virtue of this Agreement to any third party. This Agreement may be amended pursuant to the terms and provisions of this Agreement without the consent of any other third parties or the holders of any bonds or other debt obligations of the MPPA.

9.9 Actions Contesting Agreement. At the written request of the Board, each Member shall be required to appear and to defend any action or legal proceeding in any jurisdiction that is prosecuted by any party (whether or not a Member) or otherwise brought to determine or contest: (i) the validity of this Agreement; (ii) the lawfulness or the authority of the MPPA hereby created, (iii) the legal authority of any Member to undertake the activities contemplated by this Agreement, (iv) the legal authority of the MPPA to undertake the activities contemplated by this Agreement; or (v) the legal authority to perform any of the Members' respective obligations arising under or by virtue of this Agreement. Each Member so appearing in all such contexts shall be responsible for its own expenses including without limitation legal expenses, arising under or in connection with any such proceeding. All Members agree not to commence or prosecute an action to challenge the validity or interpretation of this Agreement without having first obtained the consent of the Board to commence or prosecute such action. If all Members are not named as parties to any action or proceeding involving this Agreement or the MPPA, the party named shall give all other Members and the MPPA prompt notice

of the action or proceeding and provide to the MPPA and each of its Members with an opportunity to intervene. Each Member shall bear any respective costs and expenses assessed by any court or tribunal against it, except as may be covered by policies of insurance or by Section 9.2. While the MPPA shall be without income or a source of revenue, in the event the MPPA is made a party to any proceeding, the Members agree that the defense costs for the MPPA shall be borne by the Members in equal proportions (e.g., in the case of 6 Original Members who shall make an Effective Vote, 1/6th).

9.10 Entire Agreement, Amendment, Waiver. This Agreement contains the entire agreement and understanding of the Members with respect to the subject matter hereof as of the Effective Date, and supersedes all prior or contemporaneous oral or written understandings, agreements, promises, or other undertakings by and among the Members. This Agreement may not be modified or amended, nor any rights thereunder waived, other than by a written instrument and in all cases in the manner set forth in Section 7.2 of this Agreement. No course of dealing by or among the Members or the MPPA or any delay in exercising any rights hereunder shall operate as a waiver of any rights of any party.

9.11 Governing Law; Venue. This Agreement shall be governed by, interpreted and construed in accordance with the laws of Montana. The venue of any suit or arbitration arising under this Agreement shall be in Lewis and Clark County, Montana.

9.12 Captions. The article and section captions used in this Agreement are for convenience only and shall not control and affect the meaning or construction of any of the provisions of this Agreement.

9.13 Severability. Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law. In the event any provision of this Agreement is held to be prohibited by or invalid under applicable law such provision shall be ineffective only to the extent of such prohibition or invalidity, without affecting or invalidating the remainder of this Agreement.

9.14 Counterparts. This Agreement may be executed in counterparts and via facsimile. Each counterpart shall be deemed to be an original instrument. All such counterparts together will constitute one and the same Agreement.

9.15 Time is of the Essence. It is hereby agreed that time is of the essence in the performance of all covenants and conditions to be kept and performed under the terms of this Agreement.

9.16 Filing under the Interlocal Cooperation Act. Within ten days after approval or authorization of this Agreement by no less than four Original Members, each such approving Original Member, or their agents, shall file a copy of this Agreement with the Secretary of State for Montana and with the county clerk and recorder of each of the counties in which Original Members casting an Effective Vote are located. Notwithstanding the foregoing, it is the intention of the Original Members that this Agreement be effective, if at all, as of the Effective Date.

IN WITNESS WHEREOF, the undersigned have each executed and delivered this Agreement to be effective as of and on the Effective Date.

[Signature Pages To Follow]

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EXHIBIT 1

INITIAL CONTRIBUTIONS OF THE ORIGINAL MEMBERS

ASSUMING 100% EFFECTIVE VOTE BY ALL ORIGINAL MEMBERS**

Local Government:	**Amount:**
City of Billings	$25,000
City of Bozeman	$25,000
Consolidated Government of the City/County of Butte-Silver Bow	$25,000
City of Great Falls	$25,000
City of Helena	$25,000
City of Missoula	$25,000

**In the event that all of the Original Members stated above fail to make an Effective Vote, those Original Members who do make an Effective Vote agree and acknowledge that each shall be required to increase the amount of their initial contribution as required by the Original Board.

The Members acknowledge that such increase shall be on a proportionate basis (e.g., in the event of 6 Original Members, on the basis of $1/6^{th}$ and in the event of 5 Original Members, on the basis of $1/5^{th}$).

Appendix F

Table 3. Ten Largest U.S. Publicly Owned Generator Electric Utilities Ranked by Megawatthour Sales to Ultimate Consumers, 2000

Publicly Owned Electric Utilities	State	Amount	Percent
Los Angeles City of	California	23,400,000	7.77
Salt River Proj Ag I & P Dist	Arizona	21,223,184	7.04
Long Island Power Authority	New York	17,751,817	5.89
San Antonio Public Service Bd	Texas	16,651,996	5.53
Power Authority of State of NY	New York	14,257,877	4.73
Jacksonville Electric Auth	Florida	10,989,769	3.65
South Carolina Pub Serv Auth	South Carolina	10,619,544	3.52
Austin City of	Texas	10,375,582	3.44
Sacramento Municipal Util Dist	California	9,780,307	3.25
Seattle City of	Washington	9,556,892	3.17
Subtotal		**144,606,968**	**47.99**

Note: Percentage calculations are based on total generator electric utilities.

Source: Energy Information Administration, Form EIA-412, "Annual Report of Public Electric Utilities." Individual electric utilities report fiscal year data. Appendix B shows the fiscal year for each electric utility.

http://www.eia.doe.gov/cneaf/electricity/public/t03p01p1.html

Appendix G

New Public Power Authorities

Montana

HB 474 was signed by governor May 5,2001, but the bill was rejected by voters in a November 2001 referendum. Thus **the Montana Power Authority only existed for a few months**. Since then, there have been additional attempts to create an authority to acquire generation and transmission facilities, but none has been successful.

Provisions of HB 474 that relate to the creation of a power authority included:

Sections 20 through 28 of the bill are effective July 1,2001; these sections may be cited as the "Montana Power Authority Act." The bill establishes a Montana Power Authority, which consists of a seven-member citizen board. Members serve staggered 4-year terms.

The Montana Power Authority may:

• Purchase electricity from any wholesale power supplier to meet the load requirements of Montana consumers;
• Purchase, construct or operate generation, transmission or distribution facilities;
• Enter into joint ventures for the financing of electric facilities;
• Request the legislature to authorize the state board of examiners to issue revenue bonds for the construction or purchase of electric facilities; and
• Participate with a municipality in any generation project that meets the state's criteria for an industrial development project.

The Authority must sell purchased or generated power at cost-based rates.

The state board of examiners can issue up to $500 million in revenue bonds to construct or buy generation, transmission or distribution facilities. The bonds are backed by the pledge of the state, and are exempt from state and local taxation.

California

SB 6x was signed by the governor May 16, 2001. The act adds Division 1.5 (beginning with Section 3300) to the Public Utilities Code. The act establishes the California Consumer Power and Conservation Financing Authority, governed by a five-member board of directors. The board includes the state treasurer and four individuals appointed by the governor.

The Authority can use its powers to:

- Finance, purchase, lease, own, operate, or construct generating facilities and other projects, on its own or through agreements or joint ventures;
- Provide financial assistance for projects or programs;
- Finance programs for consumers and businesses to invest in cost-effective energy efficient appliances, renewable energy projects, and demand-reducing programs;
- Achieve an adequate energy reserve capacity in California within five years of the bill's effective date; and
- Provide financing to retrofit power plants to improve their efficiency and environmental performance.

The Authority also can exercise the power of eminent domain.

All generation-related projects financed by the Authority shall provide electricity to California consumers at cost-based rates. Any excess generation may be sold outside of the state at just and reasonable rates.

The act also creates the California Consumer Power and Conservation Financing Authority Fund. The Authority can issue up to $5 billion in bonds, which will be secured by a pledge of revenues. The Authority can also obtain loans from the state's Pooled Money Investment Account (see section 16312 of the Government Code). Bonds issued by the Authority may be taxable or tax-exempt, and are not backed by the faith, credit or taxing power of the state or any of its political subdivisions.

The Authority cannot finance or approve any new program or project after January 1, 2007, unless the legislature extends the date. By January 1, 2005, the Bureau of State Audits shall evaluate the Authority's effectiveness and recommend whether there is a need for the Authority beyond January 1, 2007.

NOTE: It was determined that the Authority was providing only minimal value in meeting the state's energy objectives, and therefore the administrative operations of the Authority were terminated in October 2004. The Demand Reserve Program, established July 1, 2002 to compensate businesses for agreeing to reduce electricity consumption at times of peak demand, is the last Authority program and is scheduled to expire June 30, 2007. (This description was taken from the Governor's Budget Web site:
http://www.ebudget.ca.gov/StateAgencyBudgets/8000/8665/mission_statement.html

Wyoming

SF 52 was signed by the governor March 5, 2004. The act creates Wyoming Statutes 37-5-301 through 37-5-307 and 37-5-401 through 37-5-408, effective July 1, 2004. The act establishes the Wyoming Infrastructure Authority, which is governed by a five-member board of directors appointed by the governor. Members are appointed for staggered 4-year terms.

The Authority's purpose is to diversify and expand the Wyoming economy and facilitate the consumption of Wyoming energy by improving the state's electric transmission infrastructure. The Authority may:

- Plan, finance, construct, develop, acquire, own, maintain and operate property, structures, equipment and facilities needed to accomplish its objectives;
- Acquire properties by condemnation, except those items related to mineral and water properties;
- Receive money or assistance from any governmental entity;
- Operate, lease, rent and dispose of facilities that it constructs, and review every three years the feasibility of disposing of facilities it holds;
- Investigate, plan, prioritize and establish corridors for the transmission of electricity;
- Enter into partnerships with public or private entities.

Once the Authority has identified a transmission need, it must give private entities the opportunity to provide the service. The Authority may proceed with its plans if no private entity comes forward or if the private entity has not begun work on the project within 180 days of notifying the Authority of its intent.

The Authority can borrow money and issue bonds that are exempt from taxation within the state of Wyoming. Bond payments shall be made solely out of revenues derived from the operation of the electric transmission facilities or from unexpended bond proceeds. Bonds issued are not obligations of the state of Wyoming or a Wyoming county or municipality.

The Authority can also issue bonds to finance transmission facilities not owned by the Authority. The aggregate amount of bonds issued for this purpose cannot exceed one billion dollars. These projects must be located at least partially within Wyoming.

Idaho

HB 106 was signed by the governor on March 15, 2005. The act amends Title 67 of the Idaho code by adding Chapter 89, Title 67, to create the Idaho Energy Resources Authority. A "trailer bill," SB 1192, signed by the governor on April 6, 2005, authorizes the Authority to provide non-utility generators financing for renewable energy generation projects.

The Authority is governed by seven directors appointed by the governor and confirmed by the senate, who serve five year terms. The purpose of the Authority is to promote the development and financing of transmission and generation facilities for the benefit of participating utilities. A participating utility may include any electric utility (including cooperative and municipally owned systems) that serves customers in the state and any entity that provides wholesale power or transmission services to the state's electric utilities. Another purpose of the Authority is to promote the development of renewable energy resources.

The Authority may:

- Own, purchase, or otherwise acquire generation and transmission facilities;
- Construct, renovate, maintain, repair, operate, lease, and regulate transmission and generation facilities;
- Sell, lease or otherwise provide to participating utilities the services or output of the facilities at rates designed to cover costs;
- Make loans to participating utilities to build transmission and generation facilities;
- Make loans to participating utilities to build transmission and generation facilities;
- Make loans to participating utilities to build transmission and generation facilities;
- Use the power of eminent domain, but not to acquire property of any of the state's utilities.

The Authority shall pursue development of these facilities through joint agreements with multiple utilities.

The Authority can issue bonds and borrow money. Bonds may be secured by revenues of the authority or by any part of the authority's assets. Neither the state nor any agency or subdivision of the state shall be liable for repayment of the bonds. Once all bonds issued to finance the cost of a facility are paid off, the Authority will convey title of the facility to participating utilities.

South Dakota

HB 1260 was signed by the governor on March 17,2005. The act creates the South Dakota Energy Infrastructure Authority. Its purpose is to expand the state's economy by developing energy production and transmission facilities necessary to produce and transport energy to markets both within and outside of the state.

The Authority is governed by a five-member Board of Directors whose terms are not to exceed six years. The governor appoints the directors, and the directors cannot all be from the same political party.

The Authority may:

- Provide for the financing and development of new or upgraded energy transmission facilities;
- Acquire, hold, lease and dispose of real and personal property, and construct, maintain, operate and decommission electric transmission facilities;
- Enter into partnerships with utilities to develop such facilities;
- Plan and establish corridors for the transmission of electricity;
- Acquire property by condemnation;
- Accept, from any source, financial aid or contributions of money, property and labor; and;
- Charge reasonable rates, developed after consultation with the Public Utilities Commission, for the use of all facilities administered by the Authority.

If the Authority owns transmission facilities, it shall divest itself of the facilities as soon as it has recovered its net investment.

The Authority may issue bonds, but the issuance must be approved by the legislature. Total outstanding bonds may not exceed one billion dollars. Bonds shall be secured by revenues pledged for their payment, and the state is not liable for payments on any bonds or other financial instrument issued by the Authority.

The Authority shall produce an annual report including recommendations on how to improve and promote generation in South Dakota and transmission to, from, and within the state.

Kansas

HB 2263, which incorporates HB 2045, was signed by the governor on April 18,2005. The act amends KSA 66-105a, repealing the existing section, and adding new sections 1-13. It creates the Kansas Electric Transmission Authority.

The Authority is governed by a seven-member Board of Directors. Three members are appointed by the governor and confirmed by the senate, and serve four-year terms. The chair and ranking minority member of the senate committee on utilities and the chair and ranking minority member of the house committee on utilities are ex officio members of the board, with full voting rights.

The Authority may:

- Plan, finance, construct, develop, acquire, and own transmission facilities;
- Contract for maintenance and operation of transmission facilities;
- Participate in partnerships or joint ventures, including for the purposes of financing projects;
- Recover costs through tariffs of the Southwest Power Pool RTO and by assessing fees to utilities that have benefited from construction or upgrades performed by the authority, as determined by the state corporation commission;
- Participate in and coordinating with planning activities of the Southwest Power Pool and adjoining RTOs; and
- Exercise the right of eminent domain.

The Authority may enter into contracts with the Kansas Development Finance Authority to issue revenue bonds to finance Authority projects.

The Authority may not operate or maintain transmission facilities, and shall not build or finance projects if private entities are willing to do so. The Authority may only use its powers in respect to transmission facilities that the Southwest Power Pool RTO has deemed compatible with the RTO's own plans.

New Mexico
HB 188 was signed by the governor on March 5,2007. The act creates the New Mexico Renewable Energy Transmission Authority.

The Authority is governed by seven members: three members appointed by the governor; the state investment officer; the state treasurer; one member appointed by the speaker of the house; and one member appointed by the president pro tempore of the senate. One member appointed by the governor must have financial expertise in the area of electrical transmission projects, and the other four appointed members are to have knowledge of the public utility industry and renewable energy development. The secretary of energy, minerals, and natural resources also serves as an *ex officio* non-voting member.

The Authority may:

- Finance, plan, acquire, maintain, and operate transmission and storage facilities;
- Enter into partnerships with public and private entities;
- Participate in regional transmission forums to plan and coordinate for the establishment of interstate transmission corridors;
- Issue bonds, borrow money, and collect fees; and
- Exercise the power of eminent domain if it does not involve taking utility property.

Within one year of beginning operations, transmission or storage facilities built or financed by the Authority must have 30% of their electricity originating from renewable sources. Renewable sources include solar, wind, hydropower, geothermal, hel cells that do not use fossil fuels, and biomass; electricity generated by fossil fuels or nuclear power is not eligible.

Bonds issued by the Authority shall be payable only from the revenues of the bonding fund, and are not obligations of the state. The bonds are also exempt from taxation by the state or any of its political subdivisions.

The Authority shall not build or finance projects if similar projects are already being pursued by utilities or private entities. In addition, there are restrictions on the Authority's ability to own or control transmission and storage facilities.

Colorado: HB 1150 was signed by the governor on May 23, 2007. The act establishes the Colorado Clean Energy Development Authority. The authority's purpose is to facilitate the production and consumption of clean energy and increase its transmission and use by financing projects for the production, transportation, transmission and storage of clean energy.

The authority is a political subdivision and is governed by a nine-member board of directors. Four board members are appointed by legislative leaders, one is appointed by the governor and the

remaining four are Ex Officio: the state Treasurer, the Director of the Office of Economic Development, the Commissioner of Agriculture and the Director of the Governor's office of Energy Management and Conservation.

The authority must convene task forces to develop recommendations, including whether hydro, certain clean coal technologies and certain biomass projects should be included in the definition of clean energy projects. The authority will use the recommendations to develop its three-year plans.

The authority has the right to enter into contracts and to issue bonds or other financial obligations. Bonds issued by the authority are exempt from taxation by the state, and do not constitute a debt of the state. Bonds are secured by revenue from the projects or other money in the authority's fund. The fund can accept gifts, grants and revenues paid by utilities and others using projects financed by the authority. The legislature may authorize the authority to include in a bond resolution a provision allowing the governor to request money from the general fund to be transferred to the fund upon certification by the authority that it is necessary to meet debt service reserve levels. The legislature would have to approve any such transfer from the general fund. Under certain circumstances, voter approval is required to issue financial obligations requiring a multi-year payback.

Illinois: SB 1592 was signed by the governor August 28, 2007. The act reflects a rate relief settlement with the state's two major utilities following the large increase in rates when the retail choice transition period ended in January 2007. The act also eliminates the reverse power auction for investor-owned utility power supply and in its stead establishes the Illinois Power Authority to procure power for these utilities. The purpose of the agency is to:

- Ensure reliable electric service at the lowest total cost for the three major investor-owned utilities in Illinois; Conduct competitive procurement processes;
- Conduct competitive procurement processes;
- Develop generation facilities that use indigenous coal or renewable resources; and
- Supply electricity from the agency's facilities at cost to governmental aggregators and municipal or cooperative electric systems.

The agency's two bureaus — Planning and Procurement Bureau and Resource Development Bureau — report to the director of the agency. The Planning and Procurement Bureau shall hire an expert to conduct a competitive procurement process, which must include renewable energy resources and meet the renewable portfolio standard of 25% by 2025. The Resource Development Bureau may develop, finance, construct or operate generating facilities that use indigenous coal or renewable resources. The bureau may enter into contracts with private entities and municipal electric systems to construct and operate these facilities. Power from the facilities may be sold, at cost, to governmental aggregators and municipal or cooperative electric systems. All power purchased from the agency's facilities must be sold to end-use consumers at the purchased-power price. The agency may sell excess capacity and energy into the wholesale electric market at prevailing market rates, but may not sell excess capacity or energy through the competitive procurement process.

The agency can enter into agreements with the Illinois Finance Authority to issue revenue bonds and the proceeds will be used for costs incurred in connection with development and construction of a generating facility. The maturity of the bonds must be no more than 40 years, and the bonds may be tax-exempt if the agency determines that tax-exempt status is

appropriate. All indebtedness of the agency, including debt issued on its behalf by the authority, shall not be a debt of the State or any of its political subdivision, or of the authority itself; thus the debt is not backed by the taxing power of the state or political subdivision.

The agency may exercise the power of eminent domain, except over the property of any public utility or any person owning an electric generating plant. It may also enter into agreements to transfer any land, facilities or equipment to municipal electric systems, governmental aggregators, or electric cooperatives at a price and terms that the agency determines is in the public interest.

2007 Bills That Would Establish a State Energy Authority

Indiana: HB 1824, which would require a study to assess the feasibility of creating a public power authority in northern Indiana, was approved by the House in February 2007 and by the Senate in April 2007.

Montana: HB 114, introduced in January 2007, would create a state authority for energy transmission and transportation. The bill passed the House in March, but was not voted out of the Senate Finance and Claims Committee.

State Power Authorities Established Prior to 1950

Arizona Power Authority

The Arizona Power Authority was created by the Arizona legislature in 1944 in order to acquire and market the state's share of power produced by the Boulder Canyon Project (Hoover Dam and Power Plant). The Authority, however, is not limited to these activities, and its enabling legislation carries broad powers in the field of development and marketing of electric power. The Authority is empowered to acquire, construct, and operate necessary electric generation and transmission facilities and may issue revenue bonds to acquire and construct these facilities. The statute requires that the Authority be self-supporting and prohibits it from incurring any obligation that would be binding upon the State of Arizona. The Authority also may exercise the right of eminent domain.

Arizona Power Authority is governed by a five-member commission that is appointed by the Governor, subject to confirmation by the State Senate. The commission also serves as the Authority's regulatory body and has the exclusive authority to establish electric prices.

Currently, the Authority receives the state's allocation of Hoover Dam power under a contract with the Western Area Power Administration. The Authority markets and schedules the power to 39 power customers, including cities, towns, irrigation and electrical districts, and the Central Arizona Water Conservation District.

(More information on Arizona Power Authority is available at: www.powerauthority.org)

New York Power Authority

The Power Authority of the State of New York was created by the state legislature in 1931 to provide public ownership and control of the hydroelectric development of the St. Lawrence River. The authority is governed by a seven-member board of trustees who are appointed by the governor by and with the consent of the senate. NYPA receives no tax revenue, and finances construction of its projects through revenue bonds.

NYPA sells power to over 700 business and industrial customers, government agencies in New York City and Westchester County, the state's investor-owned utilities, the Long Island Power Authority, and 47 municipally-owned utilities and four rural electric cooperatives in New York. NYPA also serves public agencies in seven neighboring states.

The authority owns 18 generating facilities and more than 1,400 circuit-miles of high voltage transmission. It commits $100 million per year to energy efficiency programs, and has been authorized, through legislation, to administer several power programs for economic development.

(More information on New York Power Authority is available at: www.nypa.gov)

Grand River Dam Authority

The Grand River Darn Authority was created in 1935 to be a conservation and reclamation district for the waters of the Grand River. GRDA's primary responsibilities are to oversee the Grand River's resources and to develop and generate water power and electric energy within the boundaries of the district. To achieve these purposes, GRDA has been granted a broad range of powers, including acquiring and owning property and exercising the right of eminent domain. GRDA also has the authority to issue revenue bonds, which are exempt from taxation by the state and any of its political subdivisions.

GRDA is governed by a seven-member board of directors. Three directors are appointed by the governor, two ark appointed by the legislature (Speaker of the House and President Pro Tempore of the Senate) and two are ex-officio positions filled by the state cooperative and municipal utility associations.

GRDA operates three hydroelectric facilities and a coal-fired complex, and manage two lakes along the Grand River system. GRDA sells electricity at wholesale to municipal and cooperative utilities and to industrial customers in a 24-county service area in Northeast Oklahoma.

(More information on Grand River Dam Authority is available at: www.grda.com)

South Carolina Public Service Authority

The South Carolina Public Service Authority (Santee Cooper) was created by a 1934 act of the State Legislature. Santee Cooper's responsibilities, as defined in the legislation, include providing affordable electric power, developing the Santee, Cooper and Congaree rivers for navigations, reclaiming swamplands, and reforesting the watersheds of the rivers.

Its eleven-member board of directors is appointed by the governor and approved by the state Senate. Santee Cooper can raise capital by issuing bonds, but its obligations are not obligations of the State or of any of its political subdivision. The General Assembly has never appropriated tax-generated revenues for the design, construction, operation or maintenance of the Santee Cooper system. Santee Cooper also has the power of eminent domain.

Santee Cooper owns and operates generating and transmission assets to serve both wholesale and retail customers. The authority serves residential and commercial customers in three counties and provides power to 20 electric cooperatives, two municipal utilities and industrial customers throughout the state.

(More information on South Carolina Public Service Authority is available at: www.santeecooper.com.

Lower Colorado River Authority

The Lower Colorado River Authority is a conservation and reclamation district created in 1934 by the Texas Legislature. Its purposes include providing reliable electric power supply, reliable water supply and flood control. In addition, LCRA monitors water quality in a 10-county statutory district.

LCRA is governed by a 15-member Board of Directors appointed for six-year terms by the governor, with the consent of the Texas Senate. LCRA may acquire property by condemnation, and may issue bonds exempt from taxation by the State or its political subdivision. However, it does not have the authority to levy or collect taxes, create any indebtedness payable by taxes or pledge the credit of the State.

LCRA owns and operates electric generating capacity consisting of coal-fired, natural gas-fired and hydroelectric generating plants, and operates more than 3,300 miles of transmission lines. LCRA sells wholesale electricity to more than 40 public power and cooperative utilities in a 29,809 square mile territory covering all or part of 53 counties. It also operates six dams and manages water supply along a 600-mile stretch of the Texas Colorado River.

(More information on Lower Colorado River Authority is available at: www.lcra.org.)

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